88-576

No. ___

Supreme Court, U.S.
FILED
SEP 29 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1988

BETTY J. ARCHIE, et al.,

Petitioners,

vs.

CITY OF RACINE, RONALD W. CHIAPETE, and GEORGE GIESE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

*Curry First
Perry, Lerner & Quindel, S.C.
823 North Cass Street
Milwaukee, Wisconsin 53202
(414) 272-7400

Adrian P. Schoone
Schoone, Hankel, Ware
& Fortune, S.C.
1300 South Green Bay Road
Racine, Wisconsin 53401

Attorneys for Petitioners

*Counsel of Record

September, 1988

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

I. WHETHER THE RECKLESS MISCONDUCT OF A PUBLIC OFFICIAL, IN TWICE DENYING A REQUESTED RESCUE SQUAD, IMPLICATES THE PROTECTIONS OF THE DUE PROCESS CLAUSE WHERE THE RECKLESSNESS MARKEDLY INCREASED THE PROBABILITY OF HARM AND DEATH ENSUED?

II. WHETHER FLAGRANT MISCONDUCT OF PUBLIC OFFICIALS, RISING ABOVE NEGLIGENCE TO RECKLESSNESS, WHILE TWICE REFUSING RESCUE SERVICE, IS EXCLUDED FROM DUE PROCESS PROTECTION ON THE BASIS THAT THE MISCONDUCT WAS OMISSIVE IN NATURE?

III. WHETHER THE EQUAL PROTECTION CLAUSE IS VIOLATED WHEN A PUBLIC OFFICIAL RECKLESSLY REFUSED RESCUE SERVICE TO A SERIOUSLY ILL BLACK WOMEN UNDER CIRCUMSTANCES WHERE THE FACT FINDER DETERMINED SUCH REFUSAL TO BE UNPRECEDENTED AND DETERMINED THE STATED REASONS FOR THE REFUSAL TO BE ABSURD, BUT REJECTED RACE AS A REASON FOR THE REFUSAL?

PARTIES

The petitioners in this Court, who were the plaintiffs in the proceedings below, are Betty Archie, the sister of the deceased Rena DeLacy, as administrator of her estate, and Rena DeLacy's five surviving children: Cynthia, Marlon, Darwin, Veronica, and Randall. All six plaintiffs, petitioners herein, testified during the trial.

Respondents are the City of Racine, George W. Giese, a City of Racine Fire Department dispatcher, and Ronald Chiapete, the City of Racine Fire Department Chief.

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BETTY J. ARCHIE, *et al.*,

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v.

CITY OF RACINE, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioners respectfully pray that a writ of certiorari issue to review the en banc opinion and judgment of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on May 23, 1988.

OPINIONS BELOW

The 8-3 en banc opinion of the United States Court of Appeals for the Seventh Circuit affirming the United States District Court for the Eastern District of Wisconsin

is reported at 847 F.2d 1211 (1988), and is reprinted at App. 1 to App. 34 of the Appendix to this Petition.

The earlier issued panel opinion of the Seventh Circuit, reversing in part the district court and remanding for further proceedings, is reported at 826 F.2d 480 (1987), and is reprinted at App. 36 to App. 71 of the Appendix to this Petition. The unanimous panel opinion of 36 pages became one of two dissents to the en banc decision, App. 31.

The opinion of the United States District Court for the Eastern District of Wisconsin dismissing the action is reported at 627 F.Supp. 766 (1986), and is reprinted at App. 72 to App. 87 of the Appendix to this Petition.

JURISDICTION

The judgment of the Court of Appeals was entered on July 14, 1987. A timely petition for rehearing en banc was granted and on May 23, 1988 the United States Court of Appeals for the Seventh Circuit issued its opinion and judgment affirming the district court and dismissing this action.

This petition for a writ of certiorari has been timely filed within the period allowed by Justice Stevens' Order of August 8, 1988. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

STATUTE INVOLVED

This case involves 42 U.S.C. §1983 (1982), which provides in relevant part:

> Every person who, under color of any statute, ordinance, regulations, custom or usage, of any State or Territory, or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

On May 28, 1984, Rena DeLacy, age 43, a black female, died of respiratory failure while in her apartment in the City of Racine. On the prior day at 7:19 a.m., Rena DeLacy's friend, Les Hiles, called the Racine Fire Department for emergency rescue service and spoke to dispatcher George Giese. He refused the service, told her to breath into a "little paper bag", and to stay in her apartment. Eight hours later a second call was received by dispatcher Giese from Les Hiles. He stated he was scared, her condition was the same, and inquired whether her condition would "beat the heart out"? The dispatcher said "No" twice to the inquiry. He again instructed breathing into the paper bag and again refused rescue service. She died hours later.

On July 12, 1984, this action was commenced against three City of Racine defendants (respondents herein) – Racine Fire Department dispatcher William Giese; his

employer, the City of Racine; and his supervisor, Racine Fire Chief Ronald Chiapete. A jury trial was waived and the case was tried before the Honorable Judge Evans on September 24 - 26, 1985. On February 11, 1986, the Court issued its 17 page Decision and Order dismissing all of plaintiffs' (petitioners herein) claims. (App. 72 - 87.)

The six petitioners are the sister, Betty Archie, of the deceased Rena DeLacy, as administrator of her estate, and Rena DeLacy's five surviving children: Cynthia, Marlon, Darwin, Veronica, and Randall. Their claims were 42 U.S.C. § 1983 deprivations under the Due Process Clause of the fourteenth amendment. They also asserted race and non-race fourteenth amendment Equal Protection Claims.

On May 27, 1984, Rena DeLacy lived alone at 818 College Avenue, #5, in Racine. Early that morning she was visited by a long-time friend, Les Hiles. Hiles noticed DeLacy was having difficulty breathing and at 7:19 a.m. Hiles called the City of Racine Fire Department rescue squad. (App. 37). The sole dispatcher on duty was William Giese, age 36. He had been employed by the Racine Fire Department since 1972 and as a dispatcher since March 4, 1980. (App. 37). In this 7:19 a.m. conversation[1] Hiles explained to Giese that DeLacy could "hardly

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[1] The Fire Department then recorded all calls. This 7:19 a.m. conversation and the latter one at 3:03 p.m. were typed and appear in their *entirety* in the trial court's opinion (App. 73-77). The actual voice recording is Exhibit 33. Rena DeLacy's labored breathing, obviously only available by listening to this tape exhibit, was commented upon by the trial court after listening to the recorded phone conversation (App. 75).

breathe" and needed to go to an "emergency ward". He stated she was unable to walk and, therefore, need the rescue squad. Hiles gave the address of DeLacy's apartment twice and said "I'll meet you out in front." (App. 38, 74). Giese asked to talk to DeLacy. Rena DeLacy took the telephone, said she had "hyperthermia," and reiterated that she was having "a hard time breathing." The sounds of her "heavy labored breathing" came through on the tape. (App. 74-75). Instead of sending the requested rescue squad to her apartment or advising her to go to a hospital, Giese told DeLacy to get a paper bag and breathe into it to slow her breathing down. *Id.* In fact, after he told her, "Why don't you slow down just a little bit and relax?" she asked whether this meant she should "stay in my own apartment?" He replied:

Giese: Just relax and don't breath[e] like you're breathing.

DeLacy: Okay.

Giese: Do me a favor.

DeLacy: Yes.

Giese: Get, get a little paper bag.

DeLacy: A little what?

Giese: A paper bag.

DeLacy: Paper bag.

Giese: And put it over your mouth and breathe into that. That will slow your breathing down.

DeLacy: Okay, thank you. (App. 75)

Hiles left DeLacy's apartment an hour later and returned at 3:00 p.m. Hiles telephoned the Racine Fire Department three minutes later to say that DeLacy was

still hyperventilating and that he was "scare[d]." (App. 38-39, 76-77). Dispatcher Giese again answered the call and Hiles told him that DeLacy had "tried the paper bag" and had "sat" in her apartment, yet still was having trouble breathing. Despite knowing that DeLacy's breathing troubles had continued for eight hours and that his prior medical advice had proven ineffective, Giese repeated that DeLacy could breathe into a paperbag:

Hiles asked whether this would "beat the heart out" and Giese said "No". Hiles then said, "Maybe it'll wear her heart out," but Giese again responded "No". He did not send the rescue squad. (App. 76 - 77).

Hiles left the apartment but returned later that night and found DeLacy dead. He then summoned the police and at 12:32 a.m. Sergeant Michael Ackley arrived. Sergeant Ackley noted that a hospital was only 5 or 6 blocks away. The trial court found that Sergeant Ackley "was immediately concerned that the situation had been handled inappropriately." (App. 77).

An autopsy revealed that DeLacy's death was from respiratory failure due to bilateral vesicular pulmonary emphysema. (App. 39). Expert medical testimony at trial by Dr. Baylon stated DeLacy's breathing problem was a "treatable medical condition: the minimum treatment – known for 25 years – was applying oxygen." (App. 8, 39, 69).[2]

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[2] DeLacy's appreciable change of survival was further established by the fact that she had been successfully treated in the past with the aid of a Racine rescue squad. This treatment included placing an oxygen mask over her mouth during the trip to the hospital (App. 69 - 70).

Giese admitted this was the only refusal, involving thousands, during his four years employed as a dispatcher. (Tr. 106, 118 - 119, 131 - 133). Giese also testified that this was the first time he had instructed someone to breathe into a paper bag. (App. 80).

Fire Chief Chiapete testified that the policy of his department was always to send rescue squads in emergencies and that Giese should have done so for DeLacy. A Racine ordinance gave the Fire Chief the responsibility to delineate calls to respond to and established, by custom and usage, rescue squad service in emergencies as a "right" bestowed upon Racine residents. (Tr. 143 - 144).

Had Giese on May 27, 1984, requested a rescue squad to DeLacy's apartment, a vehicle was then immediately available. These rescue squads were equipped with oxygen equipment and two attendants – all emergency medical technicians by training. Indeed, earlier in that same year, the rescue squad did provide emergency service to DeLacy, including placing oxygen over her mouth as soon as she was inside the rescue squad. (Tr. 243 - 4).

The findings (non-jury trial) by the district court below show that Giese was aware of DeLacy's need for emergency services:

> It is clear from listening to the tape that Hiles was anxious to get help for DeLacy. It is also clear when DeLacy spoke that she was in distress. In his testimony, Giese acknowledged that he recognized the difficulty she was having. The sounds of her heavy, labored breathing are heard on the tape. (App. 40 - 1, 58, 74, 80).

The district court found that at trial Giese could not explain why he had not sent the rescue squad or why, on

both occasions, he merely told DeLacy to breathe into a paper bag. (App. 80). The trial court found that Giese did not refuse to send a squad because DeLacy was a black woman. The judge found that there was lacking a pattern of discrimination against blacks and that Giese "sent rescue squads regularly into the black community." (App. 79 - 80).

There was evidence at trial suggesting, as a result of all of the evidence, that Giese's actions and conduct in their totality caused Hiles to leave DeLacy, caused DeLacy not to seek additional sources of aid,[3] and effectively dissuaded her from leaving her apartment. (App. 34, 60, 67, 70).

The trial court concluded "[r]escue services should unquestionably have been provided to DeLacy." (App. 87). Nevertheless, the trial court dismissed all claims against all respondents. It focused on a succession of cases from the Seventh Circuit which assert there is "nothing in the Constitution which requires governmental units to act when members of the public are in danger." (App. 86). The trial court felt that no denial of state services could ever be actionable under § 1983. (App. 59).

The DeLacy family then succeeded in part in their appeal to the Seventh Circuit. On July 14, 1987, a three-judge panel unanimously determined there was sufficient evidence to permit a fact finder to hold Giese's conduct amounted to an abuse of power violative of the Due

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[3] Rena DeLacy had relatives nearby. Her sister, Betty Archie, lived approximately 12 blocks away. Her son, Marlon, lived 4 1/2 blocks away, and one of her daughters, Veronica, lived 2 blocks away.

Process Clause. (App. 71). The appeal court recognized the fourteenth amendment does not create a judicially enforceable right to a minimum level of governmental services. (App. 46). It further noted that the fact a tortfeasor is a municipal employee is not sufficient to make his or her tort or conduct an unconstitutional abuse of power. (App. 49). The Seventh Circuit panel did find that "[w]hether a particular state actor's conduct resulting in loss of life, liberty, or property amounts to a constitutional violation depends on the totality of the circumstances of a given case." (App. 49). In so stating, the panel noted an abuse of state power may violate the fourteenth amendment and "this is no less true when the misuse is a deliberate refusal to furnish a state-provided service." (App. 52). The panel concluded:

> In sum, the evidence presented at trial in the district court's findings of fact could support a finding that Giese, who was under a state duty to act, exercised state power in at least a reckless and arbitrary fashion because he twice refused to send an ambulance for no articulable reason in conscious disregard of a substantial risk. (App. 59).

The panel accordingly found under all of the circumstances that a remand was required so the fact finder could determine if "Giese refused to carry out his state-law duty to act and thus created this grave risk for illegitimate reasons such as malice or arbitrariness but not because of an honest error or mistaken judgment." (App. 60).[4]

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[4] The panel also commented upon the "special relationship" concept, noting that such could be established on the record based upon "Giese's exercise of constructive control over DeLacy, and his possible reckless and arbitrary refusal to send an ambulance . . . ." (App. 67).

The respondents' then successfully suggested en banc consideration and on May 23, 1988, the full Seventh Circuit, through Judge Easterbrook, affirmed the trial court (App. 1 - 34).[5] He addressed three claims for § 1983 liability. He focused upon 1) whether a violation of state law amounts to an unconstitutional "abuse of power", 2) whether grossly negligent rescue operations violate the Constitution, and 3) whether the Constitution of its own force requires a state to supply effective rescue services. (App. 6).

Throughout Judge Easterbrook's ensuing analysis is his determination that "Giese was not reckless in the constitutional sense." (App. 14). "No trier of fact could infer that Giese was indifferent to the value of human life." (*Id.*)

Judge Easterbrook also answered the question explicitly left open in *Daniels v. Williams*, 474 U.S. 327, 334 n.3

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[5] Judge Posner, joined by Judge Flaum, concurred. (App. 25-30). Judge Posner commented in various respects on the majority opinion. He concluded Giese exhibited gross negligence and further suggested DeLacy's race may have been a motive for the refusal. (App. 25). Judge Posner also stated the state law remedy, Wis. Stats. § 893.80(3), "is inadequate because of the $50,000 ceiling on damages that Wisconsin imposes . . . . This ceiling is too low, under modern conceptions of the value of human life, to provide adequate compensation and deterrence in a wrongful death case . . . ." (App. 25). Judge Posner is the author of the Seventh Circuit opinion in *DeShaney vs. Winnebago County*, 812 F.2d 298 (7th Cir. 1987), *cert. granted*, 108 S.Ct. 1105, U.S. Sup. Ct. No. 87-154 (oral argument Nov. 2, 1988).

(1986) as to whether certain conduct – e.g., gross negligence or recklessness – beyond negligence is actionable. " . . . gross negligence does not violate the Due Process Clause." (App. 14). Finally, Judge Easterbrook concluded with a cost/benefit analysis and described how these choices are concerns outside of the Constitution. (App. 22 - 24).

Separate dissenting opinions by Judge Cummings (App. 31) and Judge Ripple (App. 32 - 34) criticized the majority for deciding the issues in advance of this Court's decision in *DeShaney v. Winnebago County*, U.S. Sup. Ct. No. 87-154 (oral argument Nov. 2, 1988).

The dissent also incorporated the 36 page panel opinion (App. 31) and concluded as to liability that there was sufficient evidence for the fact finder to determine whether due process was implicated, recognizing Giese not only failed to dispatch but further "affirmatively discouraged her [DeLacy] and the person with her from seeking other medical assistance." (App. 34).

REASONS FOR GRANTING THE WRIT

I. THERE IS A DIRECT AND IRRECONCILABLE SPLIT AMONG THE UNITED STATES COURTS OF APPEALS ON WHETHER DUE PROCESS IS IMPLICATED WHEN A STATE ABUSES POWER IN ACTUALLY UNDERTAKING TO PROTECT A PERSON UNDER CIRCUMSTANCES WHERE THE STATE HAS ACTUAL KNOWLEDGE OF THE SPECIFIC INDIVIDUAL AND THE IMMINENT DANGER FACING HER

The decision in this case by the Seventh Circuit en banc conflicts with decisions of the Courts of Appeals of the Second, Third, Ninth, and Eleventh Circuits, all of

which have found liability in § 1983 actions generally similar to those present herein. *See Doe v. New York City Dept. of Soc. Serv.*, 649 F.2d 134 (2nd Cir. 1981); *Estate of Bailey v. County of York*, 768 F.2d 503 (3rd Cir. 1985) (survivors of child murdered by her guardians stated a cause of action under § 1983 against the state social service agency, although the child was not in legal custody of the state, and the child's guardians were not under state control or supervision); *Balistreri v. Pacifica Police Department*, ___ F.2d ___, 57 U.S.L.W. 2136 (9th Cir. Aug. 23, 1988) (woman attacked by her former spouse stated a § 1983 action against a police department, although the woman was not in its custody under circumstances where there was a state court order against the husband and she had complained to the police about his violating such); *Taylor v. Ledbetter*, 818 F.2d 719 (11th Cir. 1987) (en banc).[6]

The decision in this case by the Seventh Circuit en banc is generally consistent with decisions of the Courts of Appeals of the First, Sixth, and Eighth Circuits. See *Estate of Gilmore v. Buckley*, 787 F.2d 714 (1st Cir. 1986); *Nishiyama v. Dickson County*, 814 F.2d 277 (6th Cir. 1987); *Harpole v. Arkansas Dep't. of Human Services*, 820 F.2d 923 (8th Cir. 1987). Further, the Seventh Circuit decision in this case appears to be consistent with the decision from the same court in *DeShaney v. Winnebago County*, supra,

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[6] A cert. petition continues to be pending in this case. Pet. for cert. filed, Dkt. No. 87-521, 56 U.S.L.W. 3290 (U.S. Sept. 25, 1987).

and a case to be argued before this Supreme Court on November 2, 1988.[7]

The decision in this case, if permitted to stand, encourages the carte blanche rejection of governmental abuse of power claims under the Due Process Clause simply because the situation is one involving generally a person in need of protection. The decision below encourages a too simplistic notion that the Constitution is, and only is, a charter of negative liberties. (App. 17).[8] And a further inflexible proposition that the "Bill of Rights limits the power of government" (App. 1) yet permits state power to be utilized to one's detriment if the State has undertaken to protect or rescue a person.[9]

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[7] The dissent below in this case asserts otherwise, distinguishing this case from *DeShaney*. (App. 63 - 64). This petition further highlights distinguishing factors between this case and *DeShaney*. In so doing, it primarily focuses upon the facts in this case, demonstrating Giese, by his abusive actions, materially worsened the danger facing DeLacy.

[8] For a different analysis see, Keynes, *The Fourteenth Amendment, 42 U.S.C. § 1983, and State Inaction: Did the Authors of the Enforcement Act of 1871 Intend Civil Liability for the States' Failure to Protect Individual Rights* (1988). This unpublished article is appended to the petitioners' reply brief in *DeShaney* (filed on or about September 19, 1988). The article provides an extensive and detailed analysis of legislative history and record respecting various versions of H.R. 320 and its amendments, 42d Congress 1st session (1871).

[9] A more careful and individualized analysis demonstrates in a case with such extreme facts as here that the government is to be criticized not only for doing too little but also that it did too much. That is, Rena DeLacy's ultimate plea

(Continued on following page)

II. THE DECISION OF THE SEVENTH CIRCUIT EN BANC RESOLVED IMPORTANT § 1983 ISSUES WHICH THIS COURT SPECIFICALLY LEFT UNRESOLVED IN *MARTINEZ V. CALIFORNIA* AND *DANIELS V. WILLIAMS* AND RESOLVED SUCH IN A MANNER ADVERSE TO ESTABLISHED § 1983 PRINCIPLES

The dissent below urged that cases of this type with extreme facts be decided by the fact finder by examining the "totality of the circumstances" (App. 49) and "all the circumstances" (App. 60) to ascertain whether the exercise of state power was so reckless and arbitrary as to violate the Constitution. In *Martinez v. California*, 444 U.S. 277 (1980) this Court was faced with an affirmative duty to protect issue when the California Parole Board was sued for a murder committed by a parolee five months after his release on parole. That case denied liability under a causation analysis – cause being too attenuated. This Court, however, limited the scope of its ruling by noting that the Board was unaware of the danger to a particular victim, stating that, "[w]e need not *and do not decide* that a parole officer could never be deemed to 'deprive' someone of life by action taken in connection with the release of a prisoner on parole." 444 U.S. at 286 (emphasis added). In this case, the majority opinion effectively holds and concludes, irrespective of how the power

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(Continued from previous page)

is a plea to be left alone; better to have been left alone and, for example, to have had the phone not answer (as continuously busy). However, she was not left alone but rather directed to stay in her apartment and breathe into a paper bag under circumstances where relatives and a hospital were nearby. The repetition of this occurrence eight hours later highlights the power abused.

is abused, § 1983 liability will not attach in any rescue or protection context. Accordingly, the majority has within the Seventh Circuit decided the issue not resolved by this court in Martinez.[10]

The majority opinion below was also definite in resolving the negligence *versus* gross negligence or recklessness distinction. The majority concluded that " . . . gross negligence does not violate the Due Process Clause." (App. 14). This issue was expressly left open by this court in *Daniels v. Williams*, 474 U.S. 327, 334 n.3 (1986) ("Accordingly, this case affords us no occasion to consider whether something less than intentional conduct, such as recklessness or 'gross negligence,' is enough to trigger the protections of the Due Process Clause.")

Further, certain Courts of Appeals have taken a position contrary to that of Judge Easterbrook in this case, thus creating another split in the Circuit Courts of Appeals. Recently, for example, the Ninth Circuit noted deliberate or reckless indifference to safety may render conduct cognizable under § 1983. *Balistreri v. Pacifica Police Department*, ___ F.2d ___, 57 U.S.L.W. 2136 (9th Cir. Aug. 23, 1988). See, e.g., *Taylor v. Ledbetter*, 818 F.2d 791, 793 (11th Cir. 1987) (en banc), pet. for cert. filed, Dkt. No. 87-521, 56 U.S.L.W. 3290 (U.S. Sept. 25, 1987).

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[10] See opinion from denial of cert. by Justice White, joined by now Chief Justice Rehnquist, in *Jackson v. City of Joliet*, 715 F.2d 1200 (7th Cir. 1983), cert. denied, 465 U.S. 1049 at 1051 (1984).

See App. 15 n.8 setting forth other courts that have resolved this question in different manners.[11]

III. THE DECISION BY THE SEVENTH CIRCUIT EN BANC HOLDING DUE PROCESS IS NOT VIOLATED WHEN THE STATE AFFIRMATIVELY ACCEPTED DIRECT CONTROL OVER AN IDENTIFIED VICTIM BY DIRECTING HER TO REMAIN IN HER APARTMENT OVER AN EIGHT HOUR PERIOD AND THEREBY MARKEDLY INCREASED HER PROBABILITY OF HARM IS THE FIRST COURT OF APPEALS DECISION TO SO HOLD AND IS ALSO CONTRARY TO GENERAL PRINCIPLES ENUNCIATED BY THIS COURT IN *WHITLEY V. ALBERS*

Only the Seventh Circuit of all the Courts of Appeals has held ineffectual protection actions by the State do not implicate Due Process and § 1983 in the more particularized situations involving the State acquiring a type of custody over the person and taking actions which markedly increase and worsen the danger facing the person. This case is the most extreme from the Seventh Circuit and can be distinguished from other Seventh Circuit cases where the defendants' actions although egregious, arguably did not worsen the plight of the victim. *See Jackson v. Joliet*, 715 F.2d 1200 (1983) (police permitted motorists to burn to death in their automobile although the police defendants, through negligence or recklessness, were unaware of any passengers in the automobile). Accordingly, this Court should grant the writ so that this

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[11] Further on the "special relationship" § 1983 liability analysis, only the Seventh Circuit – in *DeShaney* and this case – and the Eighth Circuit, *Harpole v. Ark. Dept. of Human Serv.*, 820 F.2d 923 (1987) have expressly rejected special relationship.

en banc decision, erroneously decided, does not become adopted by other circuits.[12]

In developing this argument in support of this petition for issuance of the writ and recognizing the issues before this Court in *DeShaney* (argument November 2, 1988), petitioners agree with this Court's enunciation in *Youngberg v. Romeo*, 457 U.S. 307, 317 (1982) that there is no generalized constitutional duty of the government to furnish substantive services. Neither *DeShaney* nor this case is at odds with this correct constitutional proposition. But more narrowly, the extreme position taken by the court below implicates this Court's "deprivation" analysis in *Daniels v. Williams, supra* and its recklessness/wantonness analysis in *Whitley v. Albers*, 475 U.S. 312 (1986). This case again concerns an action against a government as much because of what it did rather than what it did not do. The decision in this case, finding no liability under circumstances where the dispatcher markedly increased harm to DeLacy and placed her in a much worse position, sets this case apart from all others.[13]

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[12] The Seventh Circuit has decided more of these cases than any other circuit, e.g., *Bowers v. DeVito*, 686 F.2d 616 (1982); *Jackson v. City of Joliet*, 715 F.2d 1200; *Beard v. O'Neal*, 728 F.2d 894 (1984); *Jackson v. Byrne*, 738 F.2d 1443 (1984); *Ellsworth v. City of Racine*, 774 F.2d 182 (1985); *Walker v. Roe*, 791 F.2d 507 (1986). The Seventh Circuit activity has in part been adopted by other circuits. *See* Comment, *Actionable Inaction: Section 1983 Liability for Failure to Act*, 53 U.Chi.L.Rev. 1084 (1986).

[13] This case can also be distinguished from *DeShaney* and that line of cases because they also involved conflicting constitutional values. Those cases recognize the parent's primary due process liberty right to the companionship and

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The extreme misconduct of respondent dispatcher George Giese markedly increasing the probability of harm:

(i) affirmatively acquiring a type of custody over DeLacy by rendering unsolicited facile medical advice and directing her to remain in her apartment;[14]

(ii) further acknowledge and sanctify this type of custody by repeating the conduct eight hours later;[15] and

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custody of their children versus the child's liberty interest in avoiding physical and sexual abuse from deranged parents. See *Whitley v. Albers*, 475 U.S. 312 (1986) (juxtaposing prison guard's right to avoidance of injury during prison riot with right and responsibility of institutional defendants to use force to quell prison riot.); *In re Scott County Master Docket*, 672 F.Supp. 1152 (D. Minn. 1987) (parents seeking damages under § 1983 for asserted interference with parental rights).

[14] The fact finder could so hold (App. 70). The second dissent also characterizes his conduct as "an assumption of responsibility" over DeLacy (App. 34). Thus, DeLacy's capacities for self-protection was severely limited by the government directing her to stay in her apartment and to follow the medical advice. Liability is thus entirely compatible with the language of the Due Process Clause providing protection where the State has *already deprived the individual of their liberty. See also Davidson v. Cannon*, 474 U.S. 344, 355 (1986) (Blackmun, J., dissenting) ("where the State *renders* a person vulnerable and strips him of his ability to defend himself, an injury that results from a State official's negligence in performing his duty is particularly related to the governmental function.") (emphasis added).

[15] The Eleventh Circuit en banc in *Taylor v. Ledbetter*, supra, cited the Fourth Circuit in *Fox v. Custis*, 712 F.2d 84 (4th

(Continued on following page)

(iii) affirmatively discouraged DeLacy from seeking available private aid.[16]

Under these facts, one may conclude the court below has created a contradiction by initially asserting even the most ineffective rescue service does not violate Due Process (because the Constitution dictates the government leave persons alone) while ignoring the reality that Giese's affirmative conduct was a violation of due process because HE FAILED TO LEAVE HER ALONE.[17]

Thus, this constitutes the situation where a constitutional duty arises only when the State, by exercising a significant degree of custody or control over an individual, places that person in a worse situation than she would have been had the government not acted. Such a situation could arise by virtue of the State affirmatively placing an individual in a position of danger, effectively

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Cir. 1983) to make clear that a right to protection may arise "out of special custodial *or other relationships* created *or assumed* by the State in respect of particular persons." 818 F.2d at 798 (emphasis added).

[16] DeLacy had a sister and several children desirous and available to assist her within blocks of her apartment. In addition, a hospital was also blocks away, *supra*. In the past, DeLacy had accepted rescue squad services and on that occasion the administration of oxygen relieved her breathing problem (App. 69 - 70). The totality of Giese's conduct, a fact finder may have held, caused DeLacy to remain in her apartment, caused her friend, Hiles, to leave, and dissuaded her from seeking private aid (App. 60, 67, 70).

[17] Judge Easterbrook, "The men who wrote the Bill of Rights were not concerned that Government might do too little for the people but that it might *do too much to them.*" (App. 17) (emphasis added).

stripping a person of her ability to defend herself and/or cutting off potential sources of private aid. *See Wideman v. Shallowford Community Hosp., Inc.*, 826 F.2d 1030, 1035 (11th Cir. 1987) (citations omitted).

Accordingly, the decision by the majority in this case goes against the principle endorsed by other circuits that duties to protect do arise under the Due Process Clause when the State itself has put the person in danger. *E.g., Escamilla v. City of Santa Ana*, 796 F.2d 266, 269 (9th Cir. 1986).

The reckless analysis by the other circuits are consistent with this Court's eighth amendment analysis in *Whitley v. Albers*, 475 U.S. 312 (1986), supporting liability when there is "a reliable inference of wantonness." The dissent in this case noted that the facts could support a finding that Giese "acted at least recklessly and arbitrarily, if not intentionally, in twice refusing to send an ambulance." (App. 58). The dissent also noted that on remand the trier of fact would need to resolve whether Giese "created this grave risk for illegitimate reasons such as malice or arbitrariness but not because of an honest error or mistaken judgment." (App. 60).[18]

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[18] This analysis is consistent with this Court's discussion of due process liability in *Whitley*, scrutinizing "behavior from which a wanton willingness to inflict unjustified suffering on respondent can be inferred." 475 U.S. at 321.

IV. THE DECISION BY THE SEVENTH CIRCUIT EN BANC HOLDING THE FOURTEENTH AMENDMENT EQUAL PROTECTION CLAUSE WAS NOT VIOLATED CONSTITUTES A DECISION IN CONFLICT WITH PRINCIPLES DEVELOPED BY THIS COURT RESPECTING EQUAL TREATMENT UNDER LAW

The writ should be granted so this Court may address the issue decided by the court below in affirming the trial court's rejection of race as a reason for the refusal of the rescue squad on two occassions. That finding is not only clearly erroneous but of more importance it constitutes a holding by an appellate court en banc that, where every reason and inference falls out, race will still be rejected as a reason for such refusal.

In this case the courts below, after the benefit of a full trial, concluded dispatcher Giese's multiple, inconsistent reasons were "absurd" (App. 91). It also determined that Giese could not explain his multiple actions and further that his explanations were inconsistent, including changing his trial testimony from direct to cross to re-direct examination. (App. 40-41).

This Court must correct the analysis and conclusion sanctioning racial discrimination.[19] The opinion should also be reviewed by this Court based on the Equal Protection Clause violation when Giese arbitrarily singled out Rena DeLacy for treatment different than that given all

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[19] The concurring opinion stated its suspicion that race was the motivating factor for Giese twice refusing rescue squad service. (App. 25).

others requesting municipal ambulance services. *See generally, Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982). See also the analysis by the Seventh Circuit panel in this case. (App. 53-54). Again the recklessness and arbitrariness permeating Giese's misconduct and refusals compel the conclusion that he did in fact arbitrarily single out Rena DeLacy for different treatment. This conclusion is buttressed by his testimony that over the four years he served as a dispatcher, he had dispatched on thousand's of occassions, *except* this single occassion. The proverbial one in thousand(s).

Discrimination on such an irrational basis violates equal protection. *See Balistreri v. Pacifica Police Department*, ___ F.2d ___, 57 U.S.L.W. 2136 (9th Cir. Aug. 23, 1988); *Bartalone v. County of Berrien*, 643 F.Supp. 574, 576 (W.D. Mich. 1986); *Thurman v. City of Torrington*, 595 F.Supp. 1521, 1527 (D. Conn. 1984). *See also Sherrell v. City of Longview*, 683 F.Supp. 1108, 1112 (E.D. Tex. 1987).

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the judgment and en banc opinion of the United States Court of Appeals for the Seventh Circuit.

Alternatively, the petition should be granted summarily, the decision of the Seventh Circuit should be vacated, and the case remanded for further consideration in light of this Court's pending decision in *DeShaney v. Winnebago County,* No. 87-154 (oral argument November 2, 1988).

Respectfully submitted,

September, 1988

CURRY FIRST
Counsel of Record
PERRY, LERNER & QUINDEL, S.C.
823 North Cass Street
Milwaukee, Wisconsin 53202
(414) 272-7400

ADRIAN P. SCHOONE
SCHOONE, HANKEL, WARE
& FORTUNE, S.C.
1300 South Green Bay Road
Racine, Wisconsin 53401

Attorneys for Petitioners

In the
United States Court of Appeals
For the Seventh Circuit

No. 86-1783

BETTY J. ARCHIE, et al.,

Plaintiffs-Appellants,

v.

CITY OF RACINE, RONALD W. CHIAPETE, and GEORGE W. GIESE,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 84-C-926—**Terence T. Evans,** *Judge.*

ARGUED OCTOBER 27, 1986—DECIDED JULY 14, 1987
REARGUED EN BANC FEBRUARY 23, 1988—
DECIDED MAY 23, 1988

Before BAUER, *Chief Judge,* and CUMMINGS, WOOD JR., CUDAHY, POSNER, COFFEY, FLAUM, EASTERBROOK, RIPPLE, MANION, and KANNE, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* The Bill of Rights limits the power of government. It insists that the government refrain from acting in certain spheres. Yet it is possible to restate most actions as corresponding inactions with the same effect, and to show that inaction may have the same effects as a forbidden action. So, for example, the Supreme Court has implied from the First Amendment "rights of access" to some information held by the government, reasoning that the right to speak implies a right

to know, and that the government would be forbidden to suppress publication of the information if it were in private hands. E.g., *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); cf. *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978).

Implication of a "positive" right (to have the government do something) out of the constitutional "negative" right (to be let alone) often depends on arguments about policy rather than on the text, structure, or history of the document; it may depend on seeing things from the perspective of collective benefits rather than the autonomy of the individual, a perspective that potentially increases the role of government in society, contrary to the plan of the Bill of Rights. Such a step therefore must be unusual and exceptionally well-justified.

Today's case presents a claim for the "positive" right of effective rescue services. It is the public version of the doctrine in tort law that no one is required to rescue another in distress, but that if he begins a rescue he had better not be negligent. **Restatement (2d) of Torts** §§ 314, 323 (1965); Prosser & Keeton, **The Law of Torts** 378-82 (5th ed. 1984). The rule that no one need volunteer respects the autonomy of bystanders (and reduces the risk that one will be conscripted into a hazardous rescue); the rule that a volunteer must act competently reflects the belief that a rescue in process may lead superior rescuers to pass by, making the victim worse off than he would have been had the first rescuer not chanced on the scene. A simple application of this rule to governmental rescue services—the police, fire departments, child welfare agencies, "hot line" phone numbers, etc.—would mean that the government need not offer such services but must provide them competently if it does. Yet the Constitution does not incorporate all tort law. *Daniels v. Williams*, 474 U.S. 327 (1986); *Baker v. McCollan*, 443 U.S. 137 (1979); *Paul v. Davis*, 424 U.S. 693 (1976); *Perry v. FBI*, 781 F.2d 1294 (7th Cir. 1986) (en banc). We must decide today how far the constitutional rule departs from the common law rule and, if they differ, whether there is an independent constitutional obligation to provide efficacious rescue services.

I

At 7:19 a.m. on May 27, 1984, Les Hiles called the fire department of Racine, Wisconsin, to request a rescue squad for his friend Rena DeLacy. Hiles told George Giese, the dispatcher, that DeLacy was "hyperventilating" and could "hardly breathe". 627 F. Supp. 766, 767 (E.D. Wis. 1986) (the district court's opinion contains a transcript of the dialogue). Hiles said that DeLacy needed medical care but could not walk to the hospital five blocks away. Giese inquired about DeLacy's age (43) and called her to the phone. She was breathing heavily. After DeLacy said that she had had a breathing problem "once" before, Giese told her to breathe into a paper bag until she calmed down. A first aid book recommends this for hyperventilation.[1]

The advice did not work. At 3:03 p.m. Hiles called again, and Giese said: "Well, if she's hyperventilating, just, just have her do what I told you to do. She's going to have to breathe into that bag." 627 F. Supp. at 768. Hiles worried that DeLacy's heavy breathing would "wear her heart out"; Giese assured him that it would not. Hiles thanked Giese and hung up. Giese was right about the heart, but this was not DeLacy's problem. She died at home late that evening from respiratory failure, brought on by emphysema and pneumonia. A physician testified that emergency administration of oxygen, followed by other appropriate care, could have saved DeLacy's life.

The administrator of DeLacy's estate and her five living children sued Giese, the City, and its fire chief under 42 U.S.C. §1983, contending that Giese's failure to send an emergency squad violated the Equal Protection and Due Process Clauses of the fourteenth amendment. The plaintiffs' principal argument at the bench trial was that DeLacy's race (black) accounted for Giese's neglect. The

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[1] Johnson & Johnson, **First Aid Book** 66-67 (reprinted by the district court, 627 F. Supp. at 770 n.1).

district court found that Giese regularly sent rescue squads to help black persons, 627 F. Supp. at 770, and that DeLacy's race did not play a role in Giese's decision. This finding is not clearly erroneous. *Pullman-Standard v. Swint*, 456 U.S. 273, 287-88 (1982).

The elimination of racial explanations left as a puzzle Giese's unwillingness to dispatch a rescue team—the only time he had declined to send help in his four years as a dispatcher. Giese testified that he did not think that DeLacy needed help urgently (perhaps because she denied having chronic breathing problems, though Giese did not spell this out) and also took into account Hiles's reputation, calling him a "jerk". The district court accepted Giese's description of his reasons but did not think much of them:

> I find absurd Giese's apparent belief that his refusal to send the rescue squad can somehow be justified because Hiles was the one who asked for it. It is undisputed that Hiles has a reputation in Racine: he was in the County Jail at the time of the trial; he drinks; he is described as an iconoclast, a character; . . . Nevertheless, on the tapes he is lucid; it is clear what he wants; his voice reflects the urgency of the situation. At trial he was articulate and perfectly capable, in my view, of judging when an emergency would exist, and also perfectly capable of describing it.

627 F. Supp. at 770-71. Moreover, the district court observed, the City's policy is to send a rescue squad to every emergency, and Fire Chief Chiapete had issued a press release stating that Giese exercised poor judgment. *Id.* at 769. Chiapete and one of his subordinates repeated that view in testimony at trial. The district court therefore characterized Giese's "conduct [as] stupid, or more charitably just poor judgment". *Id.* at 771.

That finding led the district court to enter judgment for the defendants. The court first concluded that Chiapete was not responsible for Giese's errors, so he had to be

dismissed. 627 F. Supp. at 771. The City, which is not vicariously responsible for the acts of its employees and could be responsible only for its policies and the decisions of its policy makers, also received judgment.[2]

Only Giese remained as a defendant. Relying on a series of cases in this circuit—*Ellsworth v. City of Racine*, 774 F.2d 182, 185 (7th Cir. 1985); *Jackson v. Byrne*, 738 F.2d 1443, 1446 (7th Cir. 1984); *Jackson v. City of Joliet*, 715 F.2d 1200, 1203-04 (7th Cir. 1983)—the district court concluded that failure to rescue a person in distress does not violate the Due Process Clause. 627 F. Supp. at 771-73. See also, e.g., *Donald v. Polk County*, 836 F.2d 376, 383-84 (7th Cir. 1988); *DeShaney v. Winnebago County Dep't of Social Services*, 812 F.2d 298, 301-04 (7th Cir. 1987), *cert. granted*, 108 S. Ct. 1218 (1988); *Walker v. Rowe*, 791 F.2d 507, 509-12 (7th Cir. 1986); *Hinman v. Lincoln Towing Service, Inc.*, 771 F.2d 189, 194 (7th Cir. 1985); *Beard v. O'Neal*, 728 F.2d 894, 898-900 (7th Cir. 1984); *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982). The government need not provide services, and these cases hold that if it does provide services it need not provide them com-

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[2] See *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978). The plaintiffs intimate that Giese was the City's policy maker in this case because he decided on the City's behalf not to assist DeLacy. This approach—which would establish *respondeat superior* for municipalities in all but name, was rejected in *St. Louis v. Praprotnik*, 108 S. Ct. 915, 924-25 (plurality opinion), 932-33 (separate opinion) (1988). The city also cannot be responsible on the basis of a "policy" or "custom" of neglecting its residents who need emergency help; the district court found that the City has the opposite policy, which Giese did not follow. Plaintiffs' contention that the City has a "policy" of training its dispatchers inadequately is answered by the fact that Giese received 30 hours' training as a dispatcher and performed that job without incident for four years before Hiles's call. It is unnecessary for us to decide whether a lack of training, or toleration of an employee with a history of poor judgment, may be the basis of liability. See *Harris v. City of Canton*, 725 F.2d 371 (6th Cir. 1984), *cert. granted*, 108 S. Ct. 1105 (1988). We therefore affirm the district court's judgment for the City.

petently. The district court allowed that the government must assist prisoners and others with whom it has some "special relationship" but concluded that "Rena DeLacy, personally, has no greater claim to a special relationship with Racine than do all other citizens of the city." 627 F. Supp. at 772.

A panel of this court reinstated the claim against Giese, 826 F.2d 480. We vacated that decision and set the case for rehearing en banc to consider the extent of a government's obligation to provide rescue services. We address three possibilities: that a violation of state law amounts to an unconstitutional "abuse of power"; that grossly negligent rescue operations violate the Constitution; and that the Constitution of its own force requires a state to supply effective rescue services.

II

The Due Process Clause provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law". Giese did not deprive DeLacy of her life. Emphysema and pneumonia did that. The government was not responsible for DeLacy's bronchial problems. It did not interfere with DeLacy's ability to seek medical help from private sources. It did not even promise to send help but fail to do so. Giese, and thus the state, underestimated the seriousness of DeLacy's problem, rendered inept medical advice, and declined to offer transportation to a hospital. The plaintiffs contend that this adds up to an unconstitutional "abuse of power".

Since Giese had no "power" over DeLacy and did not injure her, cases such as *Tennessee v. Garner*, 471 U.S. 1 (1985), holding that excessive force in making an arrest violates the fourth amendment, do not assist the plaintiffs. The "shocks-the-conscience" approach of *Rochin v. California*, 342 U.S. 165 (1952), is not an ambulatory source of authority to impose damages on public officials for sins of omission or everyday torts. See *Lester v. City of Chicago*, 830 F.2d 706, 710 (7th Cir. 1987) (the "reasonableness" requirement of the fourth amendment, and not prin-

ciples of substantive due process, will be used to assess injuries during an arrest); *Williams v. Boles*, No. 87-1490 (7th Cir. Mar. 2, 1988) (the eighth amendment, not substantive due process, provides the standards to assess injuries inflicted on prisoners). It is too indeterminate to offer notice to officials of the rules they must follow; it invites retrospective analysis instead of inquiring into the circumstances known at the time of the action; it dwells on imputed intent rather than on the objective circumstances. See *Coniston Corp. v. Village of Hoffman Estates*, No. 87-1890 (7th Cir. Apr. 20, 1988), slip op. 7-9. Cf. *Anderson v. Creighton*, 107 S. Ct. 3034 (1987) (damages are available for constitutional torts only if reasonable officials would have known at the time of their conduct that the behavior was unconstitutional). That judges or jurors may believe that Giese acted foolishly or even heartlessly toward DeLacy is of no moment unless he violated a duty imposed by law.

State law is one potential source of such a duty. Section 5.11.020 of Racine's municipal code requires the fire department to answer calls. Fire Chief Chiapete ordered the City's dispatchers to send medical help for every emergency (though he did not define "emergency"). The law of torts requires volunteer rescuers to be competent. So Giese may have violated a duty of care imposed by the combination of the municipal code and tort law. "May have" because §323 of the **Restatement (2d) of Torts** provides that a rescuer is liable only to the extent the lack of reasonable care "increases the risk of . . . harm" or the "harm is suffered because of the other's reliance upon the undertaking." Giese's conduct did not increase the risk of DeLacy's death (the paper bag did not asphyxiate her), and the record does not establish that she relied on his advice in deciding not to seek aid from other sources.[3]

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[3] Hiles testified that before making the first call he urged DeLacy to seek help but that "[s]he jumped back in bed and said, 'I'll be okay.' " Tr. 262. She repeated the comment during the afternoon. Hiles did not testify that DeLacy ever asked him to take her to the hospital or expressed a desire for assistance.

We shall assume nonetheless that Giese could have been held liable to the plaintiffs under Wisconsin law. See *Sanem v. Home Insurance Co.*, 119 Wis. 2d 154, 350 N.W. 2d 89 (1984) (adopting §323 of the **Restatement** as a theory of liability in Wisconsin).[4] See also *O'Neill v. Montefiore Hospital*, 11 A.D.2d 132, 202 N.Y.S.2d 436 (App. Div. 1960) (liability for giving free, though careless, advice by telephone to a stranger). Cf. *Kirk v. Michael Reese Hospital*, 117 Ill. 2d 507, 525-33, 513 N.E.2d 387, 396-99 (1987). But this is a suit under §1983, and the Constitution does not duplicate state law. It constrains the state from "abusing governmental power, or employing it as an instrument of oppression", *Davidson v. Cannon*, 474 U.S. 344, 348 (1986). Thus plaintiffs' syllogism in an effort to transmute a common law tort into a constitutional tort: state law required Giese to render competent rescue services; this was a duty; officials of the government must do their duty; failure to do one's duty is an abuse of one's office; abuse of office is abuse of governmental power; abuse of governmental power violates the Constitution.

The difficulty with this approach is that all the intermediate steps are window dressing. Because there is no tort without a duty of care, the argument as a whole adds up to the claim that torts by governmental officials violate the Constitution. It is another form of the contention that the Constitution requires a state to obey its own law. A reader could see in the phrase "due process of law" a requirement of "obedience to law", and there is some historical support for such a view, see *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1856), at least to the extent "law" meant procedures established by law. The phrase does not have such a meaning for the contemporary Court, however, for

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[4] Just how far this would go in light of the restrictions in §323 is a question we need not address. Wisconsin also has modified §323 by adopting a broad "Good Samaritan" statute protecting volunteer rescuers from liability. Wis. Stat. §895.48(1) (effective June 17, 1987).

that body has rejected the equivalence repeatedly, e.g., *Barney v. City of New York*, 193 U.S. 430 (1904); *Herbert v. Louisiana*, 272 U.S. 312, 316 (1926); *Snowden v. Hughes*, 321 U.S. 1, 11 (1944); *Davis v. Scherer*, 468 U.S. 183, 193-96 (1984).[5] As the Court put it in *Snowden*:

> If the action of the Board is official action it is subject to constitutional infirmity to the same but no greater extent than if the action were taken by the state legislature. Its illegality under the state statute can neither add to nor subtract from its constitutional validity. Mere violation of a state statute does not infringe the federal Constitution. And state action, even though illegal under state law, can be no more or less constitutional under the Fourteenth Amendment than if it were sanctioned by the state legislature.

321 U.S. at 11, citations omitted.[6] A state ought to follow its law, but to treat a violation of state law as a violation of the Constitution is to make the federal government the enforcer of state law. State rather than federal courts are the appropriate institutions to enforce state rules. Indeed, "it is difficult to think of a greater intrusion on state sovereignty than when a federal court in-

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[5] For recent, similar holdings in this court see, e.g., *Coniston*, slip op. 11; *Kasper v. Board of Election Commissioners*, 814 F.2d 332, 342 (7th Cir. 1987); *Kompare v. Stein*, 801 F.2d 883, 888 (7th Cir. 1986); *Gramenos v. Jewel Companies, Inc.*, 797 F.2d 432, 434-35 (7th Cir. 1986); *Carson v. Block*, 790 F.2d 562, 565-66 (7th Cir. 1986) (federal law). In other circuits see, e.g., *Stern v. Tarrant County Hospital District*, 778 F.2d 1052, 1058-59 (5th Cir. 1985) (en banc) (same question presented under the Equal Protection Clause; collecting cases).

[6] Just as a violation of state law does not a constitutional claim make, so the violation does not protect officials from the federal consequences of their otherwise-unconstitutional conduct. *Home Telephone & Telegraph Co. v. City of Los Angeles*, 227 U.S. 278 (1913). *Home Telephone* and *Snowden* together establish the indifference of constitutional norms to the content of state law.

structs state officials on how to conform their conduct to state law." *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 106 (1984). *Pennhurst* held that federal courts lack the authority to direct state officials to comply with state law. If the alchemist's wand can transmute a violation of state law into a violation of the Constitution, *Pennhurst* will be for naught, federal enforcement of state law the order of the day.

In one respect, and in one only, state law provides the basis for a claim under the Due Process Clause. Because "property" is defined by law, showing that one has "property" often depends on showing a legitimate claim of entitlement under state law. See *Board of Regents v. Roth*, 408 U.S. 564 (1972), and, e.g., *Upadhya v. Langenberg*, 834 F.2d 661 (7th Cir. 1987). Once state law defines the substance, constitutional law establishes the minimum procedures. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 539-41 (1985). This reference to state law as the basis of a constitutional claim does not assist plaintiffs, however, for the violation of state law is not itself the violation of the Constitution. *Bishop v. Wood*, 426 U.S. 341, 349-50 (1976). The procedural guarantees of the Due Process Clause exist apart from state law, even though they depend on it. So, for example, if state law establishes procedural entitlements, these are not themselves property and will not be enforced in the name of the Constitution. *Olim v. Wakinekona*, 461 U.S. 238, 248-51 (1983); *Hewitt v. Helms*, 459 U.S. 460, 471 (1983); *Szabo Food Service, Inc. v. Canteen Corp.*, 823 F.2d 1073, 1081 (7th Cir. 1987); *Shango v. Jurich*, 681 F.2d 1091, 1100-01 (7th Cir. 1982). Even the constitutional minima often will not be enforced in practice. If a state erratically deprives a person of property, the remedy is not a subsequent hearing but a suit to recover damage—in other words, the opportunity to obtain redress in state court *is* due process when a prior hearing is either infeasible or negligently withheld. See *Hudson v. Palmer*, 468 U.S. 517, 530-36 (1984); *Parratt v. Taylor*, 451 U.S. 527 (1981); *Ingraham v. Wright*, 430 U.S. 651, 674-82 (1977). So it is here. It

is hardly possible to hold hearings in advance to decide whether fire dispatchers will turn deaf ears to cries of distress. If, as the plaintiffs believe, Giese violated his duties under state law, the opportunity to press that claim in state court is due process of law.

Plaintiffs treat the rule of *Snowden* as an unfortunate one that we should struggle to get 'round. It is not part of this court's task to undermine decisions of the Supreme Court. For whatever it is worth, however, we do not think the rule regrettable. It implements distinctions at the core of our governmental structure—the distinction between the Constitution and law within the control of the political departments, and the distinction between state and federal rules. The basis of judicial review under *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), is the hierarchy of rules. The Constitution, adopted by the People, is beyond the control of their agents in the legislature; in the event of a conflict the Constitution must control; the hierarchy of rules, together with the nature of the Constitution as a law, supplies the authority for judges to follow the Constitution in the event of conflict, and to insist that others do the same. When the source of the rule or duty in question (here Racine's duty to respond to emergency calls) is not the Constitution but is within the control of political actors, federal courts have no rule external to the state's choices to enforce. We have only state law, which states may enforce, alter, or disregard so far as the Due Process Clause is concerned.[7] So *Martinez v. California*, 444 U.S. 277, 280-83 (1980), found no constitutional difficulty in California's grant to parole officials of immunity in damages for violating state law. The state, as the source of the law, could withdraw the remedy for reasons it thought sufficient (in *Martinez*, pro-

[7] They may not selectively enforce their laws in ways that violate other rules, such as the prohibition of racial discrimination, *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), or the first amendment—they could not, for example, rescue Republicans but not Democrats—but in light of the district court's findings of fact this case poses no such problem.

moting fearless decision making, even though the result could be, and was, to make officials more willing to release prisoners who might commit mayhem). So, too, there could be no substantial objection to Congress' decision to insulate the United States from liability for incompetent execution of discretionary accident-prevention services. *United States v. Varig Airlines*, 467 U.S. 797 (1984). See also, e.g., *United States v. Caceres*, 440 U.S. 741 (1979), among the many cases holding that the body with power to make (and unmake) the rule also may select the remedy for its violation.

A rule equating a violation of a statute with a violation of the Constitution might make states less willing to help their residents, because they could not limit the resources devoted to that task. The body with the power to create a rule also has the right incentives to police it. Cities and states are not hostile to their own laws; they do not need federal courts to prod them to enforce rules voluntarily adopted, although federal courts may be indispensable in ensuring that states adhere to constitutional norms (which the states may bitterly resent). The political branches have little reason to afford inadequate remedies for torts. The residents as a whole gain from both the compensatory and deterrent effects of tort law; such a widely supported body of law will not wither without constitutional fertilizer; voices abroad in the land do not whisper about the inadequate contemporary enforcement of tort law! Cf. *Carson*, 790 F.2d at 565. A rule that may be altered by political actors ought not be enforced as if it were constitutional; a rule created by the states should be enforced by the states. If the plaintiffs are to recover, they must appeal to norms that the Constitution places beyond the states' control.

III

One possible norm is a rule that whoever wields official power may not deliberately injure anyone. To injure is to deprive of life or liberty without due process. When

Franzen, 780 F.2d 645, 652 (1985), of recklessness (or "deliberate indifference") in constitutional law as "an act so dangerous that the defendant's knowledge of the risk can be inferred". This is the standard used in criminal law, for as we have emphasized the use of the more lenient tort-law definition of recklessness would not adequately recognize the difference between constitutional and common law obligations. E.g., *Duckworth* and *Smith-Bey v. Hospital Administrator*, 841 F.2d 751, 759-60 (7th Cir. 1988).

Giese was not reckless in the constitutional sense. The district court called his acts "stupid" or "just poor judgment" (627 F. Supp. at 771), not reckless. He did not know that DeLacy was near death; he did not even know that she had a chronic respiratory problem. Giese inquired about DeLacy's problems; he did not simply refuse to listen and hang up. When Giese asked DeLacy whether she had experienced the breathing problem before, she answered "once". During the second call, Hiles told Giese that DeLacy had experienced a similar problem "once in a while". These comments would not have alerted every caring person that DeLacy had a chronic respiratory problem (which emphysema is), now propelled by pneumonia to a life-threatening point. No trier of fact could infer that Giese was indifferent to the value of human life.

Giese certainly was negligent, meaning that the cost of taking precautions (dispatching a rescue squad that was standing by) was less than the expected benefits (the value of a life, multiplied by the probability that the life would be lost in the absence of care). See *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947) (L. Hand, J.); *United States Fidelity & Guaranty Co. v. Jadranska Slobodna Plovidba*, 683 F.2d 1022, 1025-26 (7th Cir. 1982). Giese may have been grossly negligent, meaning that the cost of taking precautions was substantially less than the expected benefits. The district judge was not asked to, and did not, choose between these characterizations. He did not need to, because gross negligence does not violate the Due Process Clause.

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Gross negligence blends into negligence; there is an indistinct and unusally invisible line between benefits exceeding the cost of precautions (negligence) and benefits substantially exceeding the costs (gross negligence). The malleable quality of these terms has produced scoffing among many, who see gross negligence as simply negligence "with the addition of a vituperative epithet." *Wilson v. Brett*, [1843] 11 M.&W. 113, 116, 152 Eng. Rep. 737 (Rolfe, B.). See also Prosser & Keeton, **Torts** §34. A line that cannot be policed is not a line worth drawing in constitutional law.

The line ought not be drawn even if it could be patrolled. The distinction between negligence and gross negligence does not respond to the functions of the Due Process Clause. The Court concluded in *Daniels* and *Davidson* that the Clause is designed to control abuses of governmental power, and on that account does not reach negligence but does proscribe intentional deprivations. "Recklessness" is a proxy for intent; "gross negligence" is not. To say that conduct is not reckless is to say that there is no basis for finding abuse of governmental power. An error is still an error, "gross" or not; "due process" does not mean "due care"; since *Daniels* and *Davidson* held that errors are not unconstitutional, it follows that "gross negligence" is not a sufficient basis of liability.[8] "Our Con-

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[8] Other courts have resolved this question in a number of different ways. One circuit has held that even recklessness is not sufficient for liability. *Washington v. District of Columbia*, 802 F.2d 1478, 1481 (D.C. Cir. 1986). Another has held that recklessness or deliberate indifference is both necessary and sufficient for liability. *Bass v. Jackson*, 790 F.2d 260, 262-63 (2d Cir. 1986). Two more hold that gross negligence is enough. *Colburn v. Upper Darby Township*, 838 F.2d 663, 668 & n.3 (3d Cir. 1988) (over Judge Garth's vigorous dissent, *id.* at 675-81); *Metzger v. Osbek*, 841 F.2d 519, 520 n.1 (3d Cir. 1988) (over Judge Weis's dissent, *id.* at 523); *Jones v. Sherrill*, 827 F.2d 1102, 1106 (6th Cir. 1987); *Vincent v. Campbell County Fiscal Court*, 820 F.2d 194, 199-200 (6th Cir. 1987). Still other courts have reserved the question. E.g., *Jackson v. Procunier*, 789 F.2d 307, 312 (5th Cir. 1986).

stitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liabilities for injuries that attend living together in society." *Daniels*, 474 U.S. at 332.

IV

The last possibility we need consider is that the Constitution of its own force compels the government to rescue those in danger. A duty to rescue is attractive, for government ought not be indifferent to the welfare of its residents. Yet what is the source of the duty? "As a general matter, the State is under no constitutional duty to provide substantive services for those within its border." *Youngberg v. Romeo*, 457 U.S. 301, 317 (1982). See also, e.g., *Lyng v. United Auto Workers*, 108 S. Ct. 1184 (1988) (no entitlement to food stamps); *Harris v. McRae*, 448 U.S. 297 (1980) (no entitlement to funding for medical care—abortions in particular). How could there be a "duty to rescue" in a Constitution that does not require the government to educate or provide minimal social welfare services for its residents?

The Due Process Clause is phrased in the negative. It says that a state shall not "deprive" residents of life, liberty, or property, save with due process. It does not require the state to furnish residents with property they lack, or ensure that they do not suffer loss at private hands.[9] For seventy years after the adoption of the fourteenth amendment, there was a serious constitutional question whether a state even *could* create a social welfare system of the sort that is common today. We therefore concluded that the Constitution in general, and the Due Process Clause in particular,

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[9] For a contrary view see Comment, *Actionable Inaction: Section 1983 Liability for Failure to Act*, 53 U. Chi. L. Rev. 1048 (1986).

> is a charter of negative rather than positive liberties. . . . The men who wrote the Bill of Rights were not concerned that Government might do too little for the people but that it might do too much to them. The Fourteenth Amendment, adopted in 1868 at the height of laissez-faire thinking, sought to protect Americans from oppression by state government, not to secure them basic governmental services.

Jackson v. City of Joliet, 715 F.2d at 1203. We held there that the Due Process Clause did not furnish a remedy to the estate of a person incinerated in his car while a police officer directed traffic around the blaze, not troubling to look for survivors.

A string of cases before and since (see page 5) illustrates the point. The state released a madman from confinement and failed to protect someone who, it should have realized, was in special danger; we held in *Bowers* that the Due Process Clause does not require the state to imprison maniacs or protect its citizens from them. See also *Martinez*. When a city's fire fighters walked out, the city retaliated with a lockout and refused to supply equipment to strikers who tried to put out a blaze; two children died; we held in *Jackson v. Byrne* that the Due Process Clause does not require a city to provide fire fighting services (even though, we assumed, the city's failure violated state law). When the bodyguards assigned to protect the wife of an officer on the narcotics squad left for the day, the wife was severely beaten by people holding a grudge against the husband, a risk the city well knew (hence the guards); we held on these particular facts in *Ellsworth* that the Due Process Clause did not require the city to protect the wife from this known risk. When a state's prison became tense, the administrators conducted business as usual, and in the ensuing riot three guards died and others were gravely wounded; we held in *Walker* that the Due Process Clause does not require a state to provide its employees with safe working conditions or protect them from murderers. When a social worker suspected that the child's father was beating him, she removed the

child from the home, only to be overruled by higher officials implementing a policy of leaving children with their parents; the caseworker neglected continuing signs of abuse, and the father later beat the child into a vegetable; we held in *DeShaney* that the Due Process Clause does not ensure that social workers will be competent, even if incompetence exposes children to grave injury at private hands. Other courts of appeals have reached similar conclusions, adopting the principles generated by the sequence of cases in this circuit.[10]

The rule that the government need not protect its residents from private predators or their own misfortune is an implication of the language and structure of the Due Process Clause. Amendments designed to protect the people from the government, to cut it down to size lest it repeat the excesses of George III and the slave states, amendments adopted when governmental services were more likely to be viewed as forbidden than as desirable, amendments phrased as prohibitions on governmental action rather than requirements of it, are not a plausible source of mandatory rescue services. Having held in Parts II and III than the Due Process Clause requires of the state less than the common law of torts requires of private rescuers, we cannot very well turn around and use the same text as the fount of rescue services—for the common law does not require anyone to volunteer as a rescuer. **Restatement (2d) of Torts** §314 ("The fact that the

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[10] E.g., *Washington v. District of Columbia*, 802 F.2d 1478, 1480-82 (D.C. Cir. 1986); *Estate of Gilmore v. Buckley*, 787 F.2d 714, 720-23 (1st Cir. 1986); *McClary v. O'Hare*, 786 F.2d 83, 88-89 (2d Cir. 1986); *Harpole v. Arkansas Dep't of Human Services*, 820 F.2d 923 (8th Cir. 1987); *Ketchum v. Alameda County*, 811 F.2d 1243 (9th Cir. 1987); *Escamilla v. City of Santa Ana*, 796 F.2d 266 (9th Cir. 1986); *Wideman v. Shallowford Community Hospital, Inc.*, 826 F.2d 1030, 1034-37 (11th Cir. 1987). Contra, *Estate of Bailey v. County of York*, 768 F.2d 503, 510-11 (3d Cir. 1985), a decision we considered and expressly rejected in *DeShaney*, 812 F.2d at 303-04. Dicta supporting the position in *Bailey* appear in *Jansen v. Conrad*, 747 F.2d 185 (4th Cir. 1984).

actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action.")

To say this is not to rely on a sharp distinction between "negative" and "positive" rights. As we said at the outset, it is frequently possible to state a "positive" right in "negative" terms (e.g., "No state shall collect taxes unless it uses some of them to provide competent rescue services to its residents."). See David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. Chi. L. Rev. 864 (1986). The Supreme Court sometimes uses the negative rights of the Constitution as the foundation for positive ones. The best known example is *Gideon v. Wainwright*, 372 U.S. 335 (1963), combining negative language in the Due Process Clause with ambiguous language in the Counsel Clause of the sixth amendment to hold that the state must provide a lawyer free of charge to criminal defendants who cannot afford one—if imprisonment lies in prospect, *Scott v. Illinois*, 440 U.S. 367 (1979). See also *Griffin v. Illinois*, 351 U.S. 12 (1956), holding that if the state makes a transcript a practical necessity for appeal in a criminal case, it must furnish transcripts to indigent defendants even though there is no independent constitutional right to an appeal, and *Boddie v. Connecticut*, 401 U.S. 371 (1971), holding that a state may not insist that indigent persons come up with the $60 filing fee to initiate a divorce proceeding.

These and similar cases depend on the role of the state as the initiator (in criminal cases) or as holder of a legal monopoly (in the divorce case). Having put the citizen on the defensive, or having stripped away avenues of self-help, the state must afford a procedure reasonably likely to reach an accurate conclusion even if that means the implication of positive rights from negative ones. When the government does not monopolize the avenues of relief, or when it has already afforded process sufficient to yield accurate decisions, it has no further obligation to give aid. See *United States v. Kras*, 409 U.S. 434, 445 (1973); *Ortwein v. Schwab*, 410 U.S. 656 (1973); *Ross v. Moffitt*, 417

U.S. 600 (1974); *United States v. MacCollom*, 426 U.S. 317 (1976); *Pennsylvania v. Finley*, 107 S. Ct. 1990 (1987).

Here, too, the constitutional rule proves to be a shadow of the common law of torts, changing only the mental states on the rationale of *Daniels*.

> One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection is under a similar duty to the other.

Restatement (2d) of Torts §314A(4). ("Similar" refers to a duty "similar" to that of an innkeeper or common carrier to its customers.)

> One who, being under no duty to do so, takes charge of another who is helpless adequately to aid or protect himself is subject to liability to the other for any bodily harm caused to him by
>
> (a) the failure of the actor to exercise reasonable care to secure the safety of the other while within the actor's charge, or
>
> (b) the actor's discontinuing his aid or protection, if by so doing he leaves the other in a worse position than when the actor took charge of him.

Restatement (2d) of Torts §324. These are old and honored rules. See *South v. Maryland*, 59 U.S. (18 How.) 396 (1856).

The Cruel and Unusual Punishments Clause has been conformed to these principles explicitly. The jailer deprives the prisoner of avenues of self help and also exposes him to much greater risk (of assault by other prisoners). Accordingly the state must protect one prisoner from another, at least when it acts (or stands by) deliberately or with indifference to the prisoner's plight. E.g., *Walsh v. Mellas*, 837 F.2d 789 (7th Cir. 1988); *Watts v. Laurent*, 774 F.2d 168 (7th Cir. 1985). The state also must supply medical care for prisoners' serious conditions of which it

is aware. *Estelle v. Gamble*, 429 U.S. 97 (1976). *Youngberg* gives the same reading to the Due Process Clause for wards of the state who are not prisoners. Once it has taken a person into custody, the state must afford humane medical treatment, *Youngberg* holds.

The state may take custody of a person, or propel him into danger, without formal imprisonment or civil commitment. We have suggested that if the government hurls a person into a snake pit it may not disclaim responsibility for his safety. *Bowers*, 686 F.2d at 618; *Walker*, 791 F.2d at 511. One application is that if one police officer starts beating a suspect without cause, the state (through other officers) has a duty to rescue the suspect from this aggression. E.g., *Byrd v. Brishke*, 466 F.2d 6 (7th Cir. 1972); *Rascon v. Hardiman*, 803 F.2d 269, 276 (7th Cir. 1986). A second application is that if the state hauls away a child's parent and thereby exposes the child to danger, it will have to protect the child from the incremental risk. E.g., *White v. Rochford*, 592 F.2d 381 (7th Cir. 1979) (police arrested the driver of a car and took him away, leaving small children to fend for themselves on a superhighway).[11] Perhaps by parallel reasoning if the state suppressed private ambulance services, or so flooded the market with subsidized (or free) aid that private rescue services no longer could make a profit and hence disappeared, the state would have a duty to furnish ambulance services—though *Kras* looks the other way, for the government has a monopoly of bankruptcy services, yet the Court held that it may exclude persons too poor to go bankrupt.[12]

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[11] The dissenting opinion in *White* observed that the kids, out drag racing on the Chicago Skyway with their uncle, were in greater danger before the police took the uncle away than they were after. We need not decide whose characterization of the facts in *White* was best; we are concerned here only with the principle.

[12] The government does not have a monopoly of debt-adjustment services (persons regularly settle debts outside the courts), so perhaps *Kras* may be reconciled with *Boddie*, but to the extent they conflict we are bound by the more recent decisions.

Courts sometimes sum up such cases by saying that the Due Process Clause requires the state to protect those with whom it has a "special relationship". See *Ellsworth*, 774 F.2d at 185. Like other legal phrases, this one has acquired a life of its own. Instead of being a shorthand for the kind of circumstances reflected in *Byrd* and *White*—cases in which the state either deliberately inflicted injury or greatly increased risk while constricting access to self-help—it has become a magic phrase, a category in which to dump cases when a court would like to afford relief. E.g., *Estate of Bailey v. County of York*, 768 F.2d 503, 510-11 (3d Cir. 1985), a case whose reasoning and result we rejected in *DeShaney*, 812 F.2d at 303-04. See also *Harpole v. Arkansas Department of Human Services*, 820 F.2d 923, 926 (8th Cir. 1987) (approvingly reading *DeShaney* as "expressly reject[ing] the idea that a special relationship exists in situations other than between a prison and its inmates."). Instead of trying to define the phrase with greater precision, it is better to jettison the language while adhering to the principles that the phrase once summarized. When the state puts a person in danger, the Due Process Clause requires the state to protect him to the extent of ameliorating the incremental risk. When a state cuts off sources of private aid, it must provide replacement protection.

The principles do not assist the plaintiffs, however. The state did not cause DeLacy's diseases or otherwise propel her into danger (breathing into a paper bag is not itself dangerous). It did not take DeLacy into custody. It did not hinder her from seeking other sources of aid; she could have called a private ambulance or asked Hiles or one of her relatives (who lived nearby) to take her to the local hospital. It therefore did not violate her rights under the Due Process Clause.

V

A city that offers rescue services must make choices. It must decide how many false alarms to tolerate in order to render assistance to those in genuine need. It must

decide how much to invest in these services, knowing that if subsidized public services displace private services the quality of care may fall because the public sector may fail to offer the salaries necessary to attract the best professionals into the field. It must decide on a level of care high enough to meet expectations legitimately engendered by the announcement of the service, without being so high as to induce people to rely excessively on what is supposed to be a safety net rather than a source of primary care.

Higher quality rescue services may come at the expense of a higher budget for the police or schools, or at the expense of higher taxes that induce people to relocate to low-service (and low-tax) jurisdictions. A city may decide to spend more on parks or museums and less on rescue, even though its officials know that recreation and education are coming at the expense of health. It may do this without subsequently answering in damages to people who subsequently expire before they reach a hospital. People through the democratic process may choose more or less safety by altering their support of the fire department, the police, the courts, schools, social welfare programs, and programs of safety inspections. This choice is one without a single right answer, and therefore one for the political rather than the judicial branches.

The City of Racine could decide:

- Not to have a rescue service, or
- To have a rescue service, but not one staffed by personnel as skilled as those in the private sector (thereby releasing part of its budget for other projects), or
- To have a rescue service, and to recruit top-quality personnel, but not to have a tort remedy for delicts (thereby leaving to first-party insurance the task of covering the slip-ups that are inevitable in the provision of medical care), or

- To have a rescue service, to seek to provide top-quality care, and to offer a tort remedy against the government itself, but to limit the remedy so that the costs of the tort system do not consume more total resources than the state is willing to devote to rescue, or
- To have a rescue service, to strive for perfection, and to offer full tort compensation as well.

Wisconsin apparently has chosen the fourth of these options. Its courts would have entertained this suit, but the maximum remedy available is $50,000. Wis. Stat. §893.80(3). The plaintiffs thought that inadequate and pursued this litigation in hopes of recovering more.

Section 1983 is not, however, a source of authority for federal courts to revise the structural choices any government must make. Political society exists to choose among the many good things we all wish to have, but which cannot be attained simultaneously. A higher limit on recoveries would induce the government to take more care, but it might also induce the government to cut back on rescue services, helping DeLacy's heirs at the expense of those in need in the future. The Constitution does not require the state to hew to the best balance between effective care and expensive care—even if we knew what the best balance is. Dissatisfaction with the outcome of such a political choice is not a sufficient ground for declaring the structure unconstitutional.

AFFIRMED

POSNER, *Circuit Judge*, with whom FLAUM, *Circuit Judge*, joins, concurring. I join the majority opinion but write separately to propose a slightly different though consistent view of the case.

The case presents a strong human appeal for federal judicial intervention. Although the district court's finding that race played no part in Giese's decision not to dispatch an ambulance is not clearly erroneous, one suspects that, if DeLacy (the victim) and Hiles (who called for the ambulance) had been white, Giese would not have been so casual about the situation and so quick to dispense his own medical advice. The victims in these failure-to-rescue cases appear to be drawn disproportionately from marginal segments of the community, where the ordinary political pressures for effective provision of public rescue services may be attenuated. And although Giese's gross negligence, which may well have cost DeLacy her life (I shall come back to the question of causation), cries out for a remedy in damages, the plaintiffs' tort remedy under Wisconsin law is inadequate because of the $50,000 ceiling on damages that Wisconsin imposes in suits against public agencies and employees. This ceiling is too low, under modern conceptions of the value of life, to provide adequate compensation and deterrence in a wrongful death case on behalf of a 43-year-old woman, even though she was not in good health and did not have good earnings prospects (Mrs. DeLacy was on welfare).

So plastic is the language of the due process clause of the Fourteenth Amendment, at least when viewed against the ambiguous history of the term "due process" (a history discussed recently in *Coniston Corp. v. Village of Hoffman Estates*, No. 87-1890, slip op. at 7 (7th Cir. April 20, 1988)), that a respectable textual argument can be made in favor of the proposition that Giese deprived DeLacy either of her property or her life without due process of law. It is true that a right to the dispatch of an ambulance is remote from conventional notions of property, but this is not decisive against the argument, because the Supreme Court has, for purposes of the due

process clause in any event, jettisoned those notions in favor of equating property to entitlement, and by doing so has brought within the protection of the clause all sorts of interests, such as tenure-employment rights, that are remote from traditional legal conceptions of property. See *Board of Regents v. Roth*, 408 U.S. 564, 577-78 (1972), and particularly *Goss v. Lopez*, 419 U.S. 565, 573 (1975), where the right to attend public school was deemed a property right of which the plaintiff was held to have been deprived by a brief suspension. Although an entitlement for these purposes cannot be built on an expectation created merely by practices or probabilities (e.g., a high probability that executive clemency will be granted in particular circumstances, see *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458, 465 (1981)), the ordinances and policies of the City of Racine can be viewed as a commitment to the residents of the city to dispatch an ambulance without fail in the event of an emergency.

And while Giese neither desired DeLacy's death nor even knew or suspected that she was in serious danger—thus making this case remote from cases of police brutality, the strongest cases for a federal constitutional tort remedy—his negligence may have been a cause of her death, in the normal tort sense of cause. A cause in that sense is a condition or event that made the harm of which the plaintiff is complaining substantially more likely to occur. See Calabresi, *Concerning Cause and the Law of Torts*, 43 U. Chi. L. Rev. 69 (1975). Had Giese done nothing—had he not answered Hiles' phone call at all—Hiles might well have phoned a private ambulance service and if a competent dispatcher had answered *that* call DeLacy might well have been saved. If so, Giese's negligent advice to Hiles was a cause of DeLacy's death. Our *DeShaney* case, now before the Supreme Court, is different in this regard because the victim in that case would probably have been no better off if the negligent caseworker had never intervened; he would simply have been beaten into a vegetative state by his father that much earlier. See *DeShaney v. Winnebago County Dept. of Social Services*,

812 F.2d 298, 302 (7th Cir. 1987), cert. granted, 108 S.Ct. 1218 (1988). Another distinction is that a federal tort remedy would have placed the child-welfare authorities in an impossible position: sued for invasion of parental rights if they overprotected the child and sued for depriving the child of life, liberty, or property if they underprotected him. See 812 F.2d at 304.

Nevertheless I agree that the plaintiffs in the present case must lose. This is a routine personal-injury case. If it states a claim under the Constitution, then every such case is a constitutional case if the defendant is a public employee. And because the type of limitation that Wisconsin imposes on tort suits against its employees is common, we can expect that a large fraction of such cases would be brought in federal courts as constitutional cases rather than in state court as ordinary common law tort cases. Nothing distinguishes this case from every other public-employee tort case in which the plaintiff dies or is injured or suffers a property loss, except that Giese's negligence is plain enough to be described as gross. The line between ordinary and gross negligence is too fine to constitute a satisfactory demarcation between federal and state jurisdiction; the distinction has largely been discarded in tort law, as unworkable.

The combination of the procedural innovations that have in the last quarter century revitalized 42 U.S.C. § 1983 (the main vehicle for constitutional tort litigation), with the interpretations of the Fourteenth Amendment that in the same period have vastly expanded the amendment's substantive and procedural limitations upon state action, threaten between them to transfer almost the whole of public contract law and public-employee tort law from the state courts to the federal courts. Not only are the federal courts unprepared for such an influx of litigation, but the transference would be inconsistent with a rational allocation of governmental responsibilities between the states and the federal government. The Supreme Court and the lower federal courts have therefore attempted to come up with limiting principles, and while the scope of those

principles is not entirely clear (perhaps the Court will clarify their scope in the *DeShaney* case), they appear to defeat the effort by the plaintiffs in this case to demonstrate either a deprivation of property or a deprivation of life.

The entitlement on which the plaintiffs rely is not an entitlement to demand the dispatch of an ambulance—no one could be so foolish as to suppose that if one phones for an ambulance and refuses to give the dispatcher any reason, or gives him an absurd reason (my cat has a hair ball in its stomach), the dispatcher is violating the caller's rights by refusing to send an ambulance. The only entitlement here is an entitlement to place before the dispatcher information which if true would require him to conclude that there was an emergency and therefore send the ambulance. DeLacy was deprived of this entitlement only by the negligence, possibly the gross negligence, of Giese. So if I am right that the line between negligence and gross negligence is not satisfactory as a jurisdictional benchmark, this is a case of negligent deprivation only, and we know from *Daniels v. Williams*, 474 U.S. 327 (1986), that negligent deprivations of life, liberty, or property are not actionable under the Constitution. It is therefore moot whether the entitlement I described is definite enough to count as property under the due process clause; it may well not be, cf. *Yatvin v. Madison Metropolitan School District*, 840 F.2d 412, 417 (7th Cir. 1988).

The analysis of the claim that Giese deprived DeLacy of her life is the same. If he did so, he did so negligently—not intentionally, or recklessly in the sense in which recklessness is a form of intentionality (see *Whitley v. Albers*, 475 U.S. 312, 321 (1986); *Duckworth v. Franzen*, 780 F.2d 645, 652-53 (1985)) and not merely a vivid appellation for gross negligence, see *id.* at 653. But in addition, a case that preceded *Daniels*—*Martinez v. California*, 444 U.S. 277, 285 (1980)—suggests that merely increasing the probability of death by the uncertain amount involved in this as in most failure-to-rescue cases does not rise to the level of depriving the victim of his life; a

deprivation of life in the constitutional sense requires more than the minimal causal relationship that may suffice under common law tort principles.

Admittedly there is tension between the decision today and cases such as *White v. Rockford*, 592 F.2d 381 (7th Cir. 1979), which impose liability for failure to rescue where the government placed the victim in a position of danger in the first place. The distinction between putting someone in a place of danger and enhancing the danger faced by someone who already is in danger (but through no fault of government) is a subtle one. We said in *DeShaney* that in the former case the government's conduct is apt to create a greater incremental probability of harm, and thus be a more palpable cause of the victim's injury, than in the latter case. The distinction is only one of degree, but perhaps of sufficient degree to make a constitutional difference, though that need not be decided in the present case. For this is not a case of the government's having placed the victim in danger; the danger to DeLacy came from her emphysema, though it was increased by Giese's negligence.

Although I am comfortable with the outcome of this case, I think that the State of Wisconsin may well be open to criticism for having placed what appears to be an arbitrary limitation on the damages that may be awarded for torts committed by its state and local agencies and employees. People rely on the availability of competent rescue services, and where as here the provision of those services falls far below minimum levels of competence the state ought to be answerable in damages, if not to the same extent that a private provider of such services would be then at least to a greater extent than Wisconsin law allows. We were told at argument that no disciplinary proceedings have been brought against Giese. Maybe if Wisconsin did not impose so low a ceiling on damage awards against public employees the City of Racine would not have reacted so casually to an act of gross negligence, committed by an employee of the city, that had fatal consequences.

Granted, the ceiling discourages lawsuits, and limits liability in those lawsuits that are brought; and by doing these things it reduces the cost of public services in Wisconsin and may therefore increase the extent of those services. To put this differently, the state might react to greater tort liability by curtailing rescue services; and while someone in exactly Mrs. DeLacy's position might actually be better off as a result (for reasons discussed earlier), the people of Wisconsin as a whole might be worse off. (This, by the way, is another reason for not allowing these suits to be brought in federal court under 42 U.S.C. § 1983, which contains no limit on liability.) But there is no indication that Wisconsin's ceiling on damages reflects such considerations; it appears, as I have said, to be arbitrary. It merely exerts pressure to recharacterize common law tort suits as federal constitutional tort suits, and I doubt whether it is in the long-run best interests of the State of Wisconsin to encourage the federalization of its public-employee tort law.

CUMMINGS, *Circuit Judge*, with whom CUDAHY, *Circuit Judge*, joins, dissenting. Grossly negligent conduct or reckless disregard still may be actionable under 42 U.S.C. § 1983. That question has been reserved by the Supreme Court (*Daniels v. Williams*, 474 U.S. 327, 334 n.3) and has been affirmatively answered as to gross negligence by the Third and Sixth Circuits, while recklessness or deliberate indifference is sufficient to state a claim in the Second Circuit. See n.8 *supra*. Moreover, the facts of this case demonstrate a special relationship between the state and the victim, requiring minimum competent action by defendant Giese while overseeing Rena DeLacy. See generally *Taylor v. Ledbetter*, 818 F.2d 791, 797-798 (11th Cir. 1987) (*en banc*) (applying special relationship theory to relationship between the state and a child it placed in a foster home). Unlike the majority, we cannot definitively assert the contrary because certiorari was recently granted on that issue in *DeShaney v. Winnebago County Dept. of Social Services*, 812 F.2d 298 (7th Cir. 1987), 108 S. Ct. 1105. Even the defendant conceded at oral argument that it would be liable if a special relationship existed between it and DeLacy. Since the state effectively took control over DeLacy's physical welfare when Giese instructed her to breathe into a paper bag instead of dispatching the ambulance, it was responsible for providing her with adequate protection from harm and her ultimate demise. *Walker v. Rowe*, 791 F.2d 507, 511 (7th Cir. 1986). As in *Nishiyama v. Dickson County, Tenn.*, 814 F.2d 277, 283 (6th Cir. 1987) (*en banc*), Giese was entrusted by the state with the power to save DeLacy's life and his complete failure to dispatch her aid can be deemed gross negligence or reckless indifference and hence actionable under Section 1983.

Until the Supreme Court decides *DeShaney*, I will adhere to the panel opinion herein. 826 F.2d 480 (1987).

RIPPLE, *Circuit Judge*, with whom CUMMINGS and CUDAHY, *Circuit Judges*, join, dissenting. The Supreme Court of the United States has granted certiorari in *DeShaney v. Winnebago County Dept. of Social Servs.*, 812 F.2d 298 (7th Cir. 1987), *cert. granted*, 108 S. Ct. 1218 (1988). The Supreme Court's opinion in *DeShaney* will undoubtedly provide important and, in all likelihood, controlling guidance with respect to the final disposition of this case. Under these circumstances, our respect for the decision-making processes of that Court and our responsibility to prevent the incursion of unnecessary litigation costs by the parties before us counsels against our rendering a decision in this case in advance of the Supreme Court's decision in *DeShaney*.

However, because my brothers have decided to act at this time, I am constrained to reach the merits. Yet, in doing so, I do not believe that I can ignore the pendency of *DeShaney*. If this court is to dispose of this case now, its decision ought to be in strict conformity with the established law of the circuit. This is hardly a time to break new ground; higher authority has already informed us, by the grant of certiorari, that any new ground will come from its pen, not from ours.

As the court noted in *Walker v. Rowe*, 791 F.2d 507 (7th Cir.), *cert. denied*, 107 S. Ct. 597 (1986), the case law of this circuit establishes that "when the state takes someone into its care or cuts off sources of private aid, the state must afford replacement protection. . . . Sometimes we shorten this inquiry to a search for a 'special relationship' between the state and the person to be protected. Whatever the name, the rationale lies in constraints the state imposes on private action." *Id.* at 511 (citations omitted). As the court put the point in *Bowers v. DeVito*, 686 F.2d 616 (7th Cir. 1982), all of these cases are variations on the principle that "[i]f the state puts a man in a position of danger from private persons and then fails to protect him . . . it is as much an active tortfeasor as if it had thrown him into a snake pit." *Id.* at 618; *see also Ellsworth v. City of Racine*, 774 F.2d 182,

187 (7th Cir. 1985) (Coffey, J., concurring), *cert. denied*, 475 U.S. 1047 (1986).[1]

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[1] Judge Coffey concurred in the judgment of the court on the ground that the plaintiff had relieved the city of its special duty to her by discharging her bodyguard because she did not think it was necessary for the officer to stay. *Ellsworth v. City of Racine*, 774 F.2d 182, 186-87 (7th Cir. 1985). Nevertheless, he wrote, "I believe that if it were not for this admission, the plaintiff's complaint would state a cause of action under 42 U.S.C. § 1983 (1982)." *Id.* at 186. With respect to the "special relationship" concept he wrote:

> The due process clause of the 14th Amendment encompasses a right to be free from "unjustified intrusions on personal security" such as the plaintiff suffered at the hands of her attacker. *Ingraham v. Wright*, 430 U.S. 651, 673, 97 S.Ct. 1401, 1413, 51 L.Ed.2d 711 (1976). *See also, White v. Rochford*, 592 F.2d 381, 383 (7th Cir. 1979) ("*White*"). Although the City has no general duty to protect members of the public from such danger, *Jackson v. Byrne*, 738 F.2d 1443, 1446 (7th Cir. 1984) ("*Byrne*"); *Jackson v. City of Joliet*, 715 F.2d 1200, 1203-04 (7th Cir. 1983) ("*Joliet*"); a constitutional duty to protect the personal security of specific members of the public exists under certain "special relationship[s]". *Byrne*, 738 F.2d at 1446-47. I agree with the majority that "what constitutes a 'special relationship' . . . [is] hazy and indistinct." However, I would not be as hasty as the majority to conclude that "[u]pon reviewing the facts of this case, we are unable to include within the concept of 'special relationship' the relationship between the city and the [plaintiff]."
>
> A review of the cases suggests at least two factors to consider in deciding whether a special relationship exists. One factor that has been stressed is whether the danger which the defendant allegedly had a duty to prevent was directed at the public at large or only at a specific individual. *See Martinez v. California*, 444 U.S. 277, 285, 100 S.Ct. 553, 559, 62 L.Ed.2d 481 (1980); *Fox v. Custis*, 712 F.2d 84, 88 (4th Cir. 1983). Another factor to consider is how closely the danger to the plaintiff is linked to actions of the defendant. *See Byrne*, 738 F.2d at 1446. Taking the allegations of the complaint as true, in the instant case, the defendant had clear notice of a specific danger to the plaintiff. The danger was limited to the plaintiff and her family and did not encompass the general public.

(Footnote continued on following page)

Mr. Giese did not only fail to dispatch an ambulance to Mrs. DeLacy. He also counseled her with respect to the appropriate medical treatment for her complaint. Moreover, he affirmatively discouraged her and the person with her from seeking other medical assistance. Under our cases, such an assumption of responsibility, coupled with a discouragement of seeking other help, constitutes the sort of conduct that we have held actionable. Moreover, the record contains sufficient evidence to permit a jury to determine that this action was undertaken at a level of performance which would permit recovery under *Daniels v. Williams*, 474 U.S. 327 (1986). On this basis, I would reverse the judgment of the district court and remand the case for further proceedings.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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[1] *continued*

Moreover, the danger arose as a result of the City's actions in investigating and prosecuting illegal drug dealings in the City of Racine. I am not prepared to say that, given these allegations, no "special relationship" between the city and the plaintiff could be found in this case.

Id. at 187.

JUDGMENT ORDER
ON REHEARING EN BANC

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinos 60604
May 23, 1988
Before

Hon. WILLIAM J. BAUER, Chief Judge
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. RICHARD A. POSNER, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge
Hon. KENNETH F. RIPPLE, Circuit Judge
Hon. DANIEL A. MANION, Circuit Judge
Hon. MICHAEL S. KANNE, Circuit Judge

No. 86-1783	)	
BETTY J. ARCHIE, et al.,	)	Appeal from the
Plaintiffs-Appellants,	)	United States District
v.	)	Court for the Eastern
CITY OF RACINE,	)	District of Wisconsin
RONALD W. CHIAPETE,	)	No. 84 C 926
and GEORGE W. GIESE,	)	TERENCE T. EVANS,
Defendants-Appellees.	)	Judge

This cause was reheard on the record from the United States District Court for the Eastern District of Wisconsin, _____ Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

In the
United States Court of Appeals
For the Seventh Circuit

No. 86-1783

BETTY J. ARCHIE, as Special Administrator of the Estate of Rena M. DeLacy, Deceased, et al.,

Plaintiffs-Appellants,

v.

CITY OF RACINE, RONALD W. CHIAPETE, and GEORGE W. GIESE,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Wisconsin.
No. 84-C-926—**Terence T. Evans,** *Judge.*

ARGUED OCTOBER 27, 1986—DECIDED JULY 14, 1987

Before CUMMINGS and CUDAHY, *Circuit Judges*, and WILL, *Senior District Judge.**

CUMMINGS, *Circuit Judge.* In July 1984, Betty Archie, Special Administrator of the Estate of Rena M. DeLacy ("DeLacy"), and five other individuals[1] filed this complaint

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* The Honorable Hubert L. Will, Senior District Judge for the Northern District of Illinois, is sitting by designation.

[1] The other plaintiffs were Rena DeLacy's five surviving children. Betty Archie was her sister.

seeking $1,000,000 in compensatory and $1,000,000 in punitive damages from the City of Racine, Wisconsin, Ronald Chiapete, its Fire Chief, and George Giese, a Racine Fire Department dispatcher.[2] The complaint was brought under 42 U.S.C. § 1983 and claimed that defendant Giese twice failed to send a rescue squad to take DeLacy to a hospital and twice rendered improper medical advice, thus causing DeLacy's death from respiratory failure and violating the Fourteenth Amendment.

I

The case was tried to the court in September 1985 and resulted in the dismissal of the action. The district court's findings of fact and conclusions of law are reported in 627 F. Supp. 766 (E.D. Wis. 1986). The uncontested facts and the district court's findings of fact show as follows:

Rena DeLacy was a black female, age 43. She lived alone in her Racine apartment and was visited by a longtime friend, Les Hiles, early on May 27, 1984. He noticed that DeLacy was having difficulty breathing and called the rescue squad of the Racine Fire Department at 7:19 a.m. Defendant Giese, age 36, was the sole dispatcher on duty at the time and had been employed by the Racine Fire Department since 1972 and as a dispatcher since March 4, 1980. In that year, he received 30 hours of job training before becoming a full-time telephone dispatcher.

The two conversations between DeLacy, Hiles, and Giese are reported verbatim in 627 F. Supp. at 767-768. The transcript shows that after Hiles called Giese at the fire department, Hiles explained that DeLacy could "hardly breathe" and was "hyperventilating" and needed to go to "the emergency ward" but was unable to walk and therefore needed the rescue squad. Hiles gave the address

[2] Additional defendants were Racine County and two of its officials but all three were dismissed by the trial court when plaintiffs rested their case, and plaintiffs do not appeal their dismissals.

of DeLacy's apartment twice and said "I'll meet you out in front." *Id.* at 767. Giese asked to talk to DeLacy. Rena DeLacy took the telephone, said she had "hyperthermia," and reiterated that she was having "a hard time breathing." The sounds of her "heavy labored breathing" came through on the tape. *Id.* at 768. Instead of sending the requested rescue squad to her apartment or advising her to go to a hospital, Giese told DeLacy to get a paper bag and breathe into it to slow her breathing down. *Id.* In fact, after he told her, "Why don't you slow down just a little bit and relax?" she asked whether this meant she should "stay in my own apartment?" and he said:

> GIESE: Just relax and don't breath[e] like you're breathing.
>
> DELACY: Okay.
>
> GIESE: Do me a favor.
>
> DELACY: Yes.
>
> GIESE: Get, get a little paper bag.
>
> DELACY: A little what?
>
> GIESE: A paper bag.
>
> DELACY: Paper bag.
>
> GIESE: And put it over your mouth and breathe into that. That will slow your breathing down.
>
> DELACY: Okay, thank you.

Id.

Hiles left DeLacy's apartment an hour later and returned at 3:00 p.m. Hiles telephoned the Racine Fire Department three minutes later to say that DeLacy was still hyperventilating and that he was "scare[d]." Dispatcher Giese again answered the call and Hiles told him that DeLacy had "tried the paper bag" and had "sat" in her apartment, yet still was having trouble breathing. Despite knowing that DeLacy's breathing troubles had continued for at least six hours—it was actually eight hours—and that his prior medical advice had proven in-

effective, Giese repeated that DeLacy should breathe into a paper bag:

> GIESE: Well, if she's hyperventilating, just, just have her do what I told you to do. She's going to have to breathe into that bag.
>
> HILES: Yeah, but.
>
> GIESE: Over her nose and her mouth and then slow her breathing down.
>
> HILES: Listen to me now. Is there anything [to] do with the heart?
>
> GIESE: No.

Id. Hiles asked whether this would "beat the heart out" and Giese said "No." Hiles then said "maybe it'll wear her heart out," but Giese again responded "No" and did not send the rescue squad. *Id.*

Hiles left the apartment but returned later that night and found DeLacy dead. He then summoned the police, resulting in the 12:32 a.m. arrival of Sergeant Michael Ackley, who noted that a hospital was only five or six blocks away and then telephoned a fire department dispatcher who "very seriously doubt[ed] . . . they would not respond to the call[s]" from Hiles because the rescue squad "will respond to almost all calls for service irregardless [*sic*] of the frivolity of the alleged problem." Trial Tr. 14 and Exh. 1, at 3; 627 F. Supp. at 769. The trial court found that Sergeant Ackley "was immediately concerned that the situation had been handled inappropriately." 627 F. Supp. at 769.

An autopsy on May 28 revealed that DeLacy's death was from respiratory failure due to bilateral vesicular pulmonary emphysema with superimposed bronchopneumonia. *Id.* at 767. Hospitalization or administration of oxygen might have saved her life. Trial Tr. 56-57 (testimony of Dr. Baylon).

Giese admitted that this was the first time he had refused to send a rescue squad when requested. 627 F.

Supp. at 770. He testified that this was also the first time he had instructed someone to breathe into a paper bag and that he did not normally tender medical advice. Giese Tr. 26, 29, 58-59, 60.

Defendant Fire Chief Chiapete testified that the policy of his department was always to send rescue squads in emergencies and that Giese should have done so here. A Racine ordinance gave the Fire Chief the responsibility to delineate calls to respond to and established, by custom and usage, rescue squad service in emergencies as a right bestowed upon Racine inhabitants. Trial Tr. 143-144 (testimony of Chiapete). His assistant testified too that the fire department policy was to send rescue units to all emergency calls. 627 F. Supp. at 769. After the tragic events of May 27, Fire Chief Chiapete conducted an official investigation into Giese's conduct and concluded that his decision not to send an ambulance was "an error of judgment" but was "honestly made." *Id.* A press release by Chiapete reconfirmed that it was the Racine Fire Department's policy to "never . . . refuse to send our rescue units in known emergency situations." *Id.*

The findings made by the district court show that Giese was aware of DeLacy's need for emergency services. The court found that Giese "acknowledged that Hiles was coherent and DeLacy's voice showed that she was in distress." 627 F. Supp. at 770. Giese testified that he knew Hiles' calls were a request for emergency services. Giese Tr. 36-37, 60. The trial court concluded:

> It is clear from listening to the tape that Hiles was anxious to get help for DeLacy. It is also clear when DeLacy spoke that she was in distress. In his testimony Giese acknowledged that he recognized the difficulty she was having. The sounds of her heavy labored breathing are heard on the tape.

627 F. Supp. at 768.

The district court found that at trial Giese could not explain why he had not sent the rescue squad or why on both occasions he merely told DeLacy to breathe into

a paper bag. *Id.* at 770. Judge Evans explicitly rejected one possible explanation by finding that Giese did not refuse to send a rescue squad because DeLacy was a black woman. The judge found that there was no pattern of discrimination against blacks and that Giese "sent rescue squads regularly into the black community." *Id.* at 770, 773.

The reason why Giese refused to send an ambulance is not clear. At trial, Giese's deposition was read wherein he testified that he had previously responded to requests for ambulance services made by Hiles and that the fact Hiles was the caller did not cause him to refuse to send an ambulance for DeLacy. Giese Tr. 24. Giese later changed his deposition answer by saying that in view of Hiles' reputation as a "nuisance," he did not send the rescue squad. *Id.* at 44-45. At trial he contradicted himself by first testifying that Hiles sounded "rational" and agreeing that DeLacy "talked in a manner which corroborated Mr. Hiles' statement she was having trouble breathing," *id.* at 24-25, and then, upon cross-examination by his own attorney, testifying that Hiles "sounded intoxicated" and the calls were "getting too casual," *id.* at 48, 54. Later, he admitted on redirect examination that he did not believe that DeLacy's breathing problem was a "casual situation" and that when questioned by the police about DeLacy's death he did not mention that the "conversation got out of hand" or was too "conversational." *Id.* at 61.

Not surprisingly, the district judge found "absurd" that Giese's refusal to send the rescue squad could be justified because Hiles was the caller. 627 F. Supp. at 770. As to Hiles, he added:

> [O]n the tapes he is lucid; it is clear what he wants; his voice reflects the urgency of the situation. At trial he was articulate and perfectly capable, in my view, of judging when an emergency would exist, and also perfectly capable of describing it. In addition, it should be noted that, with no difficulty, the Racine

Police Department responded to his call regarding DeLacy's death.

Id. at 771. On the basis of the testimony and deposition, Judge Evans concluded, "Giese has no consistent explanation for his action or, more appropriately, his failure to act." *Id.* at 770.[3]

II

After rendering the foregoing findings of fact, Judge Evans dismissed the City of Racine and Fire Chief Chiapete under *Monell v. New York City Department of Social Services*, 436 U.S. 658, and *City of Oklahoma City v. Tuttle*, 471 U.S. 808. We agree that their dismissal was appropriate. There is no respondeat superior liability under § 1983. *Monell*, 436 U.S. at 691. Therefore Chiapete can only be held liable for his own actions and the City for its own ordinances, customs, or usages which subjected DeLacy or caused DeLacy to be subjected to a violation of her constitutional rights. Here the district court found that Chiapete "had no personal involvement in the incident," 627 F. Supp. at 771, and plaintiffs do not contest this finding. The court also found that it was the City's policy under ordinance and usage (established by Chiapete) to respond to " 'all emergency calls.' " *Id.* at 769. Plaintiffs contend that Chiapete failed to train the dispatchers adequately on what constituted an "emergency call;" however, a single incident caused by a non-policymaker such as Giese is insufficient to prove the existence of a policy of inadequate training. *Tuttle*, 471 U.S. at 823-824 (plurality opinion). Chiapete and the City are not liable under

[3] The district judge's conclusion that Giese's explanation based on the fact that Hiles was the caller was "absurd" could mean that Giese was actually motivated by dislike, distrust, or malice towards Hiles but that this was not a reasonable justification for his actions. Whether Giese was motivated by ill will or plain arbitrariness, his conduct under the facts of this case could be found to be an unconstitutional abuse of power. See *infra* Part III.

§ 1983 because their acts and policies did not cause DeLacy to be subjected to a violation of her constitutional rights.

Plaintiffs place much reliance on the recent decision of *Pembaur v. City of Cincinnati*, 106 S. Ct. 1292, which held that a municipality can be liable under § 1983 for actions taken by its employees pursuant to policies formulated by officials " 'whose acts or edicts may fairly be said to represent official policy' " and not just policies enacted by its legislative body. *Id.* at 1298-1299 (quoting *Monell*, 436 U.S. at 694). The Court further held that "where action is directed by those who establish governmental policy, the municipality is equally responsible whether that action is to be taken only once or to be taken repeatedly." *Id.* at 1299. In the present case, if Fire Chief Chiapete had taken Hiles' calls and refused to send an ambulance or had directed Giese to refuse to send an ambulance after being apprised of the circumstances, then municipal liability might have been appropriate under *Pembaur*, notwithstanding the prior City policy to the contrary. However, municipal liability is not proper in this case because Chiapete was not involved in the decision to deny rescue services to DeLacy, a decision which was solely made by dispatcher Giese, a non-policymaker.

Plaintiffs' final argument for municipal liability is that the district judge erred when he found that Giese did not act pursuant to a City policy or custom because Chiapete's behavior following the tragic events on May 27 proves otherwise. In *Grandstaff v. City of Borger*, 767 F.2d 161 (5th Cir. 1985), certiorari denied, 107 S. Ct. 1369, the court held that a policymaker's "subsequent acceptance" of his or her employees' reckless conduct which caused a constitutional violation is evidence that the employees acted pursuant to a municipal policy or custom. *Id.* at 170-172. There the police embarked on a wild chase and shooting spree which began when a motorist wanted for questioning failed to stop when signaled to do so and ended with what a jury found to be a reckless shooting of an innocent rancher who had driven towards the police cars to

learn the reason for the commotion on the ranch. Despite the entire Borger police night shift of six officers participating in what the court described as an "incompetent and catastrophic performance," there were no reprimands, admissions of errors, official reactions suggesting that policy had been violated, or changes in policy. The court concluded that because "that episode of such dangerous recklessness obtained so little attention and action by the City policymaker, the jury was entitled to conclude that it was accepted as the way things are done and have been done in the City of Borger." *Id.* at 171. In contrast, here Fire Chief Chiapete investigated the incident, began a review of discretion given to dispatchers, and publicly reaffirmed the City's policy never to refuse to send rescue units in emergency situations. 627 F. Supp. at 769. The district judge's finding that Giese did not act pursuant to a City policy or custom is not clearly erroneous because he could find that Chiapete's behavior did not amount to a subsequent acceptance of Giese's acts tending to show their congruence with City policy or custom.

III

Our starting point for determining dispatcher Giese's liability[4] under the facts of this case is consideration of

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[4] Although plaintiffs' complaint did not specify whether they were suing Giese in his personal or official capacity, contrary to defendants' arguments, the course of the proceedings, including the district court's decision, clearly indicates that Giese was sued in his personal capacity. See *Kentucky v. Graham*, 473 U.S. 159, 167 n.14 ("In many cases, the complaint will not clearly specify whether officials are sued personally, in their official capacity, or both. 'The course of the proceedings' in such cases typically will indicate the nature of the liability sought to be imposed."); *Brandon v. Holt*, 469 U.S. 464, 469-471. Official-capacity suits are merely another way of pleading municipal liability, and "[a]s long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity." *Graham*, 473 U.S. at 165-166.

(Footnote continued on following page)

what the Supreme Court has termed the "two essential elements" of a § 1983 action: whether the conduct complained of (1) "was committed by a person acting under color of state law" and (2) "deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States." *Parratt v. Taylor*, 451 U.S. 527, 535, overruled in part on other grounds by *Daniels v. Williams*, 106 S. Ct. 662, 665. In the present case there is no dispute that plaintiffs have proved the first element. Defendants did not argue on appeal that Giese was not acting under color of state law, and, in fact, Giese's actions and failures to act were done under color of Racine ordinance, custom, and usage providing for Racine Fire Department rescue services. The crux of the present dispute is whether his conduct deprived DeLacy of her rights of life and liberty under the Due Process Clause of the Fourteenth Amendment.

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[4] *continued*
Therefore, liability in an official-capacity suit turns on the role of the municipality's policy or custom. *Id.* at 166.

In the present case, plaintiffs' pretrial brief and brief on appeal predicate municipal liability only on the basis of Chiapete's actions as a policymaker and the City of Racine's policy. Plaintiffs' Pretrial Br. 2 n.1, 17; Appellants' Br. 14, 44-47. Plaintiffs asked for a determination of "liability and a judgment" against Giese for his own actions, which is consistent with a personal-capacity suit. Plaintiffs' Pretrial Br. 18. Furthermore, the district court viewed Giese as being sued in that capacity. Despite concluding that Giese's actions were not pursuant to a municipal policy and dismissing Chiapete and the City, the judge then considered whether Giese's conduct, although contrary to policy, was sufficient to establish a constitutional violation. *Archie*, 627 F. Supp. at 771. If Giese had only been sued in his official capacity, the finding of no municipal policy or custom would have required his dismissal. See *Graham*, 473 U.S. at 165-167. Although we will "ordinarily assume" that an official has been sued in his official capacity and only in that capacity, *Kolar v. County of Sangamon*, 756 F.2d 564, 568 (7th Cir. 1985), there is no need to invoke that assumption when the course of the proceedings clearly indicates otherwise.

Our cases recognize that in large part the Constitution only creates negative duties for state actors. *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982); *Walker v. Rowe*, 791 F.2d 507, 510 (7th Cir. 1986), certiorari denied, 107 S. Ct. 597. The Fourteenth Amendment prohibits states from depriving individuals of their life, liberty, or property without due process of law, but generally it does not create a judicially enforceable right to a minimum level of governmental services. The appropriate level of governmental services is a matter of legislative providence guided by the interaction of political forces, as it must be:

> Governments regularly sacrifice safety for other things. A city may decide to spend more money on parks or education and less on police, even though its officials know that the expenditure on police would reduce the cost of crime by more than the expenditure on the police. It may do this without answering in damages to people subsequently mugged in the parks.

Walker, 791 F.2d at 510. States are not the insurers of their citizens' safety and courts would be at a loss to decide when such a duty to provide services was discharged, given the many competing demands for the vast array of services that implicate interests of life, liberty, and property. We hasten to add that our recognition of the nonjusticiability of these issues is not acquiescence in a Hobbesian state of nature where criminals or madmen terrorize others with impunity. Section 1983 was enacted as part of the Ku Klux Act of 1871 in which Congress invoked its powers under § 5 of the Fourteenth Amendment to counter "the lawless conditions existing in the South in 1871." *Monroe v. Pape*, 365 U.S. 167, 174-178, overruled in part on other grounds by *Monell*, 436 U.S. 658, 701. Besides the civil remedy presently codified in § 1983, Congress enacted criminal and civil remedies against conspiracies to violate constitutional rights, 18 U.S.C. § 241; 42 U.S.C. §§ 1985(3), 1986, and authorized the President to use the militia or "any other means" to suppress any unlawful combination or conspiracy that "so

hinders the execution of the laws of that State, and of the United States within the State," that "any part or class of its people" is deprived of a constitutional right and the state authorities "are unable, fail, or refuse to protect that right," 10 U.S.C. § 333.

Although complaints about the level of governmental services are normally only concerns of the political branches, when a state actor is under a duty to dispense protective services undertaken by the state and does so in a manner that deprives a person of life, liberty, or property, the Due Process Clause is violated. The Supreme Court has recently considered what type of conduct constitutes a "deprivation" in Fourteenth Amendment usage in *Daniels v. Williams*, 106 S. Ct. 662, and *Davidson v. Cannon*, 106 S. Ct. 668. In concluding that negligent conduct was insufficient to constitute an "abuse of power" violative of the Due Process Clause, the Court stated that "the word 'deprive' in the Due Process Clause connote[s] more than a negligent act." *Daniels*, 106 S. Ct. at 664.[5] The Court reasoned that "[h]istorically, this guarantee of due process has been applied to *deliberate* decisions of governmental officials to deprive a person of life, liberty or property" and that the Due Process Clause was " 'intended to secure the individual from the arbitrary exercise of the powers of government.' " *Id.* at 665 (emphasis in original) (quoting *Hurtado v. California*, 110 U.S. 516, 527, and *Bank of Columbia v. Okely*, 4 Wheat. (17 U.S.) 235, 244).

Conduct of a person acting under color of state law that amounts to an "abuse of power" violates the Due Process Clause and is redressable in an action brought under § 1983. " 'The touchstone of due process is protection of the individual against arbitrary action of government.' " *Daniels*, 106 S. Ct. at 665 (quoting *Wolff v. McDonnell*,

[5] The Court left open the question of whether negligent conduct might be enough to state a claim under a constitutional provision other than the Due Process Clause. 106 S. Ct. at 664.

418 U.S. 539, 558). The Due Process Clause accomplishes this not only by requiring appropriate procedural protections but also by placing "substantive limitations upon state action." *Paul v. Davis*, 424 U.S. 693, 711 n.5. These substantive limitations protect the individual against a state actor's conduct that "shocks the conscience" or "run[s] counter to fundamental notions of fairness." *Rochin v. California*, 342 U.S. 165, 172; *White v. Rochford*, 592 F.2d 381, 385 (7th Cir. 1979). As the Supreme Court has recently stated: "[B]y barring certain government actions regardless of the fairness of the procedures used to implement them, *e.g.*, *Rochin* [*v. California*, 342 U.S. 165], it serves to prevent governmental power from being 'used for purposes of oppression.' " *Daniels*, 106 S. Ct. at 665 (quoting *Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 How. (59 U.S.) 272, 277).[6] Our conclusion

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[6] When a § 1983 claim is based on a violation of substantive due process or an incorporated guarantee of the bill of rights, the plaintiff need not exhaust state remedies. See *Patsy v. Board of Regents*, 457 U.S. 496; *McNeese v. Board of Education*, 373 U.S. 668, 671-673; *Monroe*, 365 U.S. at 183 ("The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked."). The Court recently reiterated this principle in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 192-197 and n.13, where it held that first, the adequacy of state procedures for compensation is relevant to a takings violation because there is no takings violation if compensation is provided, and second, state administrative action challenged in a § 1983 action must be a "final" decision, but the Court stated that the decision did not change the holding of *Patsy* that a § 1983 litigant need not exhaust state remedial procedures. Thus, an inquiry into the adequacy of state remedies, required in procedural due process challenges by *Hudson v. Palmer*, 468 U.S. 517, 533, and *Parratt*, 451 U.S. at 543-544, is irrelevant in § 1983 actions alleging a violation of substantive due process. See *Wolf-Lillie v. Sonquist*, 699 F.2d 864, 871-872 (7th Cir. 1983); accord *Gilmere v. City of Atlanta*, 774 F.2d 1495, 1499-1502 (11th Cir. 1985) (*en banc*), certiorari denied, 106 S. Ct. 1970 and 1993; cf. *Daniels*, 106 S. Ct. at 665 (essence of substantive due process claim is that state action should not have been taken no matter the procedures employed).

in this case is the same reached by the Court in *Monroe v. Pape*, that "Congress, in enacting [§ 1983], meant to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position." 365 U.S. at 172.

We are mindful of the Supreme Court's admonition that "[§] 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law." *Baker v. McCollan*, 443 U.S. 137, 146; *Paul v. Davis*, 424 U.S. 693, 701 (Fourteenth Amendment is not "a font of tort law."). Whether a particular state actor's conduct resulting in loss of life, liberty, or property amounts to a constitutional violation depends on the totality of the circumstances of a given case. *Gumz v. Morrissette*, 772 F.2d 1395, 1400 (7th Cir. 1985), certiorari denied, 106 S. Ct. 1644; *Schillingford v. Holmes*, 634 F.2d 263, 265 (5th Cir. 1981). In *Daniels v. Williams* the Court held that the negligent leaving of a pillow on the prison stairs, and in *Davidson v. Cannon* the simple forgetting about a prisoner's note recounting a threat the prisoner had received, did "not approach the sort of abusive government conduct that the Due Process Clause was designed to prevent." *Davidson*, 106 S. Ct. at 670; *Daniels*, 106 S. Ct. at 665-666. The fact that a tortfeasor is a municipal employee is not sufficient to make his or her tort an abuse of power. *Baker*, 443 U.S. at 146. What is required is the exercise of state power in an arbitrary or abusive manner given the circumstances of the case. For example, the Fourteenth Amendment is not implicated when a person is "negligently killed by a sheriff driving a government vehicle," *Paul*, 424 U.S. at 698. However, the unjustifiable exposure of a motorist to risk of physical injury from a high-speed car chase attributable to a police officer's intentional misuse of his vehicle to harass that motorist is a violation of due process. *Checki v. Webb*, 785 F.2d 534, 538 (5th Cir. 1986) (100-m.p.h. car chase of motorist by police who failed to identify themselves and drove an unmarked car created a jury question over abuse of power due to conduct that may have

"crossed the constitutional line [making] their pursuit and harassment actionable under [§] 1983").

Decisions of this Circuit and others have held persons acting under color of state law liable for abuses of power that deprived individuals of life, liberty, or property. All agree that "[t]here is a constitutional right not to be murdered by a state officer, for the state violates the Fourteenth Amendment when its officer, acting under color of state law, deprives a person of life without due process of law." *Bowers*, 686 F.2d at 618; see *Gumz*, 772 F.2d at 1399 and n.3 (substantive due process excessive-force claim based on events surrounding an arrest); *Norris v. District of Columbia*, 737 F.2d 1148, 1150-1152 (D.C. Cir. 1984) (excessive non-lethal force used against pretrial detainee); *Johnson v. Glick*, 481 F.2d 1028, 1032-1033 (2d Cir. 1973), certiorari denied, 414 U.S. 1033 (same). Although of course not every battery constitutes a violation of liberty under the Due Process Clause, when a police officer strikes a non-interfering bystander to prevent him from photographing an arrest, an abuse of power claim can be brought. *Schillingford*, 634 F.2d at 266. A § 1983 action was successfully brought against a judge who ordered a sheriff to bring to him in handcuffs a coffee vendor and then conducted a psuedo-official inquisition, all because the judge disliked the coffee, *Zarcone v. Perry*, 572 F.2d 52 (2d Cir. 1978), and against a judge who physically ejected from his courtroom and assaulted a non-lawyer advocate, *Gregory v. Thompson*, 500 F.2d 59 (9th Cir. 1974). Similarly, this Court upheld a § 1983 action against a state judge who abused his official power by acting as a prosecutor and filing criminal charges, forging the plaintiff's signature on a guilty plea and jury waiver form, and then having the plaintiff brought before him with the expectation of imposing an unconstitutional conviction, thus violating *inter alia* the plaintiff's due process right to a disinterested judge and Sixth Amendment right to counsel and a jury trial. *Lopez v. Vanderwater*, 620 F.2d 1229, 1235-1237 (7th Cir. 1980), certiorari dismissed, 449 U.S. 1028. Finally, in *White v. Rochford*, 592

F.2d 381 (7th Cir. 1979), we held that police officers could be sued under § 1983 for recklessly exposing children to danger by leaving them in a car on the freeway after lawfully arresting their guardian for drag racing. We stated that "the unjustified and arbitrary refusal of police officers to lend aid to children endangered by the performance of official duty" could amount to a violation of the Due Process Clause. *Id.* at 383.

The theory of liability common to all these cases is that an official's deliberate misuse of state power resulting in an infringement of a constitutionally protected right or interest is actionable under § 1983. For example, the Tenth Circuit has held that some malicious prosecutions can violate the Constitution and not just the common law:

> [I]f the misuse of the legal procedure is egregious there may be a deprivation of constitutional dimensions for which a plaintiff can invoke § 1983. . . . We believe that when private parties or public officials use criminal complaints to coerce a release of civil liability from injured persons, this action, as a malicious prosecution, is egregious and qualifies as a deprivation of due process that violates the Fourteenth Amendment.

Lusby v. T.G. & Y. Stores, 749 F.2d 1423, 1431 (10th Cir. 1984), vacated in part on other grounds and remanded, 106 S. Ct. 40, and certiorari denied in part, 106 S. Ct. 65, reaffirmed by 796 F.2d 1307 (10th Cir. 1986), certiorari denied, 107 S. Ct. 275; see *Conway v. Village of Mount Kisco*, 758 F.2d 46, 48 (2d Cir. 1985), certiorari dismissed, 107 S. Ct. 390; *Norton v. Liddel*, 620 F.2d 1375, 1378 (10th Cir. 1980); *Hampton v. City of Chicago*, 484 F.2d 602, 609-610 (7th Cir. 1973), certiorari denied, 415 U.S. 917. An abuse of power claim was also upheld against local officials and a city accused of using eminent domain powers with no intent to condemn but instead to coerce a private property owner to sell his property to an entity that was not a party to the condemnation proceedings. *Suthoff v. Yazoo County Indus. Dev. Corp.*, 637 F.2d 337 (5th Cir.

1981), rehearing denied, 642 F.2d 822, certiorari denied, 454 U.S. 1157. The Fifth Circuit rejected defendants' arguments based on *Paul v. Davis*, 424 U.S. 693, that this claim should only be redressable as a common law tort:

> [T]he tort alleged, if such it be, was accomplished by an abuse of governmental power sufficient " 'to raise an ordinary tort by a government agent to the stature of a violation of the Constitution.' " . . . [A]llegations that an individual's property rights have been damaged, through a municipality's arbitrary misuse of instituted but abandoned state-law expropriation proceedings, adequately state a claim of deprivation of property without due process of law in violation of the federal constitution.

Suthoff, 637 F.2d at 340 (quoting *Williams v. Kelley*, 624 F.2d 695, 697 (5th Cir. 1980), certiorari denied, 451 U.S. 1019).

The abuse of state power violates the Fourteenth Amendment and this is no less true when the misuse is a deliberate refusal to furnish a state-provided service. The Supreme Court has indicated that § 1983 applies to denials of state protective services:

> While one main scourge of the evil—perhaps the leading one—was the Ku Klux Klan, the remedy created was not a remedy against it or its members but against those who representing a State in some capacity were *unable* or *unwilling* to enforce a state law.

Monroe, 365 U.S. at 175-176 (emphasis in original) (footnote omitted). The First Circuit in *DiMarzo v. Cahill*, 575 F.2d 15 (1st Cir. 1978), certiorari denied, 439 U.S. 927, similarly interpreted § 1983 based on *Monroe*:

> [T]he Civil Rights Acts of 1871 were intended to safeguard constitutional rights which state authorities might deny by neglecting to enforce state statutes as well as by more affirmative action. . . . Failure to act where there is a duty to act can give rise to an actionable claim under [§] 1983.

Id. at 18 n.3. The day has long since passed to argue that unconstitutional conduct is only actionable under § 1983 upon a showing of class-based discrimination or racial animus. See *Joseph v. Rowlen*, 402 F.2d 367, 369 (7th Cir. 1968); *Cohen v. Norris*, 300 F.2d 24, 29-30 (9th Cir. 1962) (*en banc*). It is sufficient that the official unnecessarily, unjustifiably, and arbitrarily acts or violates a duty to act under state law and that such a reckless or intentional act or failure to act has the natural and foreseeable consequences of causing a deprivation of a constitutional right. See *Monroe*, 167 U.S. at 187. The protection of the individual from just such arbitrary exercises of state power is the essence of due process. See *Daniels*, 106 S. Ct. at 665.

It is inconsistent with notions of fundamental fairness and due process for a state actor, consciously indifferent to the repercussions of his or her decision, to single out one individual for a denial of state-provided services. Plaintiffs contend that the Equal Protection Clause was also violated by Giese when he arbitrarily singled out DeLacy for treatment different from that given all others requesting municipal ambulance services.[7] They rely on *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, where six Justices agreed that the denial of a state-created benefit of an administrative remedy for physical-disability discrimination to one claimant solely because the state agency failed to process the claim on time was arbitrary and failed a rational basis standard of review under the Equal Protection Clause. *Id.* at 441-442 (separate opinion of Blackmun, J.); *id.* at 444 (Powell, J., concurring in judgment). Because the fundamentals of equal protection including the proscription of arbitrary treatment are embodied in the guarantee of due process, see *Bolling v. Sharpe*, 347 U.S. 497,

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[7] Plaintiffs contend that the district court erred in holding that Giese's refusal to send an ambulance was not due to the fact that DeLacy was black. This factual finding was not clearly erroneous; it was supported by evidence that Giese "sent rescue squads regularly into the black community." *Archie*, 627 F. Supp. at 773.

499; *United States Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 174-179, we need not decide if Giese's possibly reckless and arbitrary refusal to provide municipal ambulance services also violated the Equal Protection Clause. In the present case it is no less offensive to notions of due process that a state-created benefit of ambulance services was denied for no articulable reason at all by a state actor who was consciously indifferent to the known substantial risks.

Our conclusion is supported by *Byrd v. Brishke*, 466 F.2d 6 (7th Cir. 1972), in which this Court held that police officers who stood by and watched other police officers beat a person in a public place could be held liable under § 1983 for their failure to act. Although the plaintiff alleged that the officers' failures to act were negligent or intentional, their conduct had to be at least reckless because the officers witnessed the beating and knew that it was illegal. We stated:

> We believe it is clear that one who is given the badge of authority of a police officer may not ignore the duty imposed by his office and fail to stop other officers who summarily punish a third person in his presence or otherwise within his knowledge. That responsibility obviously obtains when the nonfeasor is a supervisory officer to whose direction misfeasor officers are committed. So, too, the same responsibility must exist as to nonsupervisory officers who are present at the scene of such summary punishment, for to hold otherwise would be to insulate nonsupervisory officers from liability for reasonably foreseeable consequences of the neglect of their duty to enforce the laws and preserve the peace.

Id. at 11. We followed *Byrd* in our later case of *Hampton v. Hanrahan*, 600 F.2d 600 (7th Cir. 1979), reversed in part on other grounds, 446 U.S. 754 (*per curiam*), holding that a jury could find police officers liable for "failing to assist or protect the wounded occupants" of an apartment from the beatings and abuse that followed a

shootout, stating that the fact that some police officers "did not personally participate in the abuse, but instead callously chose to watch, would not preclude their liability." *Id.* at 626; see *Maclin v. Paulson*, 627 F.2d 83, 86 (7th Cir. 1980) (police chief could be liable for being present, yet not intervening, when his officers beat a pretrial detainee).

We recently reaffirmed the holding and reasoning of *Byrd* in *Rascon v. Hardiman*, 803 F.2d 269, 276-277 (7th Cir. 1986), noting that "[t]he reasoning of the *Byrd* court has been adopted by other courts considering an officer's duty to intervene" and that we found "no cases rejecting this reasoning." *Id.* at 276. The Eleventh Circuit has followed our cases and held that police officers who watched other officers use excessive force by dragging a wounded, handcuffed suspect from his car could be held liable under § 1983 because "an officer who is present at the scene and who fails to take reasonable steps to protect the victim of another officer's use of excessive force[ ] can be held liable for his nonfeasance." *Fundiller v. City of Cooper City*, 777 F.2d 1436, 1441-1442 (11th Cir. 1985); see *Byrd v. Clark*, 783 F.2d 1002, 1007 (11th Cir. 1986). The Fifth, Sixth, Eighth, and Tenth Circuits have also followed our decision in *Byrd*, holding police officers liable for violating a state law duty to act to prevent an illegal beating. *Ware v. Reed*, 709 F.2d 345, 353 (5th Cir. 1983); *Bruner v. Dunaway*, 684 F.2d 422, 425-426 (6th Cir. 1982), certiorari denied, 459 U.S. 1171; *Webb v. Hiykel*, 713 F.2d 405, 408 (8th Cir. 1983); *Putnam v. Gerloff*, 639 F.2d 415, 423-424 (8th Cir. 1981); *Lusby*, 749 F.2d at 1433 (10th Cir. 1984); see *Armster v. City of Riverside*, 611 F. Supp. 103, 107 (C.D. Cal. 1985) (police officer can be liable under § 1983 for failure to act to prevent beating by citizens making a citizen's arrest because "a police officer has a duty to intercede to prevent an individual from being subjected to excessive, unlawful physical force regardless of who is applying the unlawful force to the individual"); *Wilkinson v. Ellis*, 484 F. Supp. 1072, 1085 (E.D. Pa. 1980) (prosecutor who failed to intervene to prevent police beating

during interrogations could be liable under § 1983 for violation of state common law duty to uphold the law as a quasi-judicial officer).

Implicit in the *Byrd* line of cases is the recognition that when a state actor is under a duty to use state power under state law and recklessly and arbitrarily refuses to exercise it, resulting naturally and foreseeably in a loss of life, liberty, or property, a violation of due process is made out. The duty of a state actor to employ state power in a non-arbitrary manner is founded on the Due Process Clause, but the state power and duty to act are based on state law. The existence of a state law duty to act distinguishes one person's failure to act from everyone else's failure to act, and the deliberate refusal to exercise the concomitant state power is the state action implicating the Due Process Clause.

The First Circuit has looked to state law in § 1983 actions to determine whether the state actor is under a duty to act. In *DiMarzo v. Cahill*, 575 F.2d 15 (1st Cir. 1978), certiorari denied, 439 U.S. 927, the court held that the Commissioner of Corrections could be held liable under § 1983 for a "pervasive failure" to carry out his duties under Massachusetts law because "[a] natural consequence of [his] failure to comply with his statutory duties to promulgate and enforce minimum standards is that conditions would fall below a constitutionally allowable limit." *Id.* at 17-18.[8] In the later case of *Clark v. Taylor*, 710 F.2d

[8] Our holding that a state official can be liable under § 1983 for conduct that amounts to an abuse of state power is consistent with *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89. In *Pennhurst*, the Court held that a federal court lacks jurisdiction to enjoin state officials from violating state law, but it remanded the case to determine if the state officials' conduct violated the Constitution, including the Due Process Clause. *Id.* at 124-125 and n.35 (citing *Youngberg v. Romeo*, 457 U.S. 307). In *DiMarzo* the First Circuit held that the official's failure to carry out state law duties resulted in prison conditions below the constitutional minimum and not just violative of state law minimums. Similarly, since

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4 (1st Cir. 1983), the First Circuit upheld a jury verdict under § 1983 against a warden, holding that the warden had a statutory duty under Rhode Island law "to protect the safety and well being of plaintiff [(a prisoner)] and that his failure to intervene to prevent the [carcinogenic] benzidine test reflected a reckless and callous indifference to plaintiff's safety." *Id.* at 9. The court held that it was irrelevant that the warden did not know the test was being performed by the state police whom he did not exercise control over because the plaintiff was "visibly upset" and the warden's "failure to inquire as to what was being done to the inmates or to respond to plaintiff's request for a lawyer evidenced a breach of his duty of care and a reckless and callous indifference to plaintiff's safety." *Id.* at 10.[9]

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[8] *continued*
we hold *infra* that the district court could find that dispatcher Giese's conduct amounted to an abuse of power, his § 1983 liability would be based on his unconstitutional exercise of state power and not merely on his violation of state law or a common law duty of care.

[9] *DiMarzo* and *Clark* are distinguishable from the later First Circuit case of *Estate of Gilmore v. Buckley*, 787 F.2d 714 (1st Cir. 1986), certiorari denied, 107 S. Ct. 270. There it was held no § 1983 action was stated where state officials released a mentally ill convict on a two-day furlough and he subsequently murdered a person whom at least some of the defendants knew or should have known was a potential target of the convict. The court stated: "We also note that the plaintiff has failed to cite any provisions of state law that either imposed a constitutionally cognizable duty on the defendants to protect Gilmore, or afforded her an entitlement to protection." 787 F.2d at 722 n.14. In *DiMarzo* and *Clark* such "constitutionally cognizable dut[ies]" existed under state law, and the reckless and arbitrary exercise of state power resulted in the constitutional violation. Unlike the present case, the facts of *Estate of Gilmore* suggest an administrative cross-up in which important information was apparently not available to the persons making the furlough decision, 787 F.2d at 718, and not a reckless and arbitrary exercise of state power amounting to an abuse of power.

In the present case, plaintiffs proved that Giese had a duty under state law to send an ambulance if one were available. The district court's findings show that pursuant to Racine Municipal Ordinance 5.11.020 and custom and usage established by the Fire Chief as a policymaker "the verbal policy of the Fire Department was to send rescue units to all emergency calls." 627 F. Supp. at 769. Fire Chief Chiapete reaffirmed that this was the policy in his press release following DeLacy's death. *Id.*

Given this duty to act under state law, if Giese exercised state power in a reckless and arbitrary manner causing DeLacy's death, a violation of due process would be shown. Here the district court's findings of fact could support a conclusion that Giese acted at least recklessly and arbitrarily, if not intentionally, in twice refusing to send an ambulance. The district court found that Giese knew the situation was serious and that an ambulance was twice requested, 627 F. Supp. at 768, yet in dealing with DeLacy, he refused to send an ambulance and instead instructed her to breathe into a paper bag. The district court found that Giese had no articulable reason for his actions. *Id.* at 770. The district court's finding that his only proffered reason was "absurd" is not clearly erroneous, given Giese's numerous inconsistent statements during the course of this litigation, see *supra* at p. 6, and the district court's finding that "on the tapes [Hiles] is lucid; it is clear what he wants; his voice reflects the urgency of the situation." *Id.* at 771; see *id.* at 770 ("[Giese] acknowledged that Hiles was coherent and DeLacy's voice showed that she was in distress."). His testimony ruled out other possible justifications for his actions, such as Hiles' and DeLacy's use of the terms "hyperventilation" and "hyperthermia" caused him to think the condition was not serious or the call appeared to be a request only for transportation and not for emergency services or the unavailability of ambulances caused him not to send one. Giese Tr. 28-29, 36-37, 48, 50. Had only one phone call requesting emergency services been made, it would be a more difficult question whether the

evidence was sufficient to allow the trier of fact to conclude that Giese exercised state power in a sufficiently abusive manner to raise what would be an ordinary tort to constitutional dimensions. However, his refusal to send an ambulance (when under a duty to do so) after two separate calls and after being told that his unsolicited "medical" advice had proven futile could be found to be sufficiently egregious to implicate due process guarantees against arbitrary state action. The fact that "he had never before decided not to send an emergency vehicle when one was requested," *id.* at 770, strengthens rather than undercuts our conclusion that the district court could find his conduct on this occasion implicated due process concerns of fundamental fairness and equal protection.

In sum, the evidence presented at trial and the district court's findings of fact could support a finding that Giese who was under a state duty to act exercised state power in at least a reckless and arbitrary fashion because he twice refused to send an ambulance for no articulable reason in conscious disregard of a substantial risk. The district court did not address this issue because it erroneously thought that no denial of state services could ever be actionable under § 1983. On the record before us, we cannot determine that as a matter of law an actionable abuse of power occurred. It requires an understanding of the totality of the circumstances of the case, see *supra* at p. 14, in order to distinguish abusive denials of state services from denials that are merely the product of exercises of poor judgment or incompetence, for the Constitution does not provide a remedy for merely tortious conduct. Remand is needed to allow the district judge to determine (based on further factfinding to the extent he feels is necessary) whether Giese's conduct crossed the line from tort to constitutional violation. To find liability, the trier of fact on remand will have to determine that Giese had reason to foresee that there was a substantial risk that DeLacy might die or suffer grievous harm if rescue services were withheld and that he deliberately and consciously imposed such a risk on DeLacy. Further,

it will have to be found that Giese refused to carry out his state-law duty to act and thus created this grave risk for illegitimate reasons such as malice or arbitrariness but not because of an honest error or mistaken judgment. The trier of fact should also consider Giese's actions of assuming control over DeLacy—by offering facile medical advice and telling her to remain in her apartment—as additional evidence of a possible abuse of power. See *infra* Part IV. Finally, if the trier of fact determines that an abuse of power occurred here, then it will have to determine whether the abuse of power caused DeLacy's suffering and death. See *infra* Part V. We have previously observed that liability under § 1983 should not "turn on the tenuous metaphysical construct which differentiates sins of omission and commission," *White v. Rochford*, 592 F.2d at 384 (footnote omitted), and the important inquiry under the Due Process Clause is not whether the conduct can be characterized as an action or failure to act or as creating a special relationship but rather whether in light of all the circumstances the conduct constitutes an abuse of power. Our prior cases attest to the fact that plaintiffs here face a difficult task, but the totality of the circumstances of this case is such that an abuse of power could be found.

Tortious conduct is an unavoidable facet of human activity and its presence in the provision of state services, though unfortunate, is not surprising. It is very difficult to distinguish between a negligent or merely reckless denial of state-provided services—including one characterized by abysmally poor judgment and blatant irresponsibility—and a denial that rises to the level of an unconstitutional abuse of power. But when an act or failure to act implicates constitutional concerns over the relationship between the individual and the state, the real need not to trivialize the Due Process Clause by making it a "font of tort law" should not become an excuse for leaving unredressed abuses of state power and in turn trivializing the Constitution. In cases such as the present one, when the state actor fails to act rather than acts and is not a traditional wielder

of state power, like a police officer, the distinction between common law tort and abuse of power is even murkier, yet the difficulty of the task is an unsatisfying retort to Congress' plain command in enacting § 1983 that federal courts be available to redress constitutional violations.

Today's decision is consistent with our earlier cases considering liability under § 1983 for a failure to act. In *Beard v. O'Neal*, 728 F.2d 894 (7th Cir. 1984), certiorari denied, 469 U.S. 825, we decided that an undercover FBI informant was not liable for failing to prevent a police officer, who was also a hit man, from committing a murder. We held that the informant did not have a duty to act and thus his inaction did not cause the victim's death. *Id.* at 899-900. Unlike police officers who have a state-law "duty to enforce the laws and preserve the peace," *Byrd*, 466 F.2d at 11, nothing in *Beard* indicates that the informant was an officer of the law and charged with upholding it under any state or federal law or custom. Furthermore, the informant's failure to act may not have been "reckless and arbitrary" given his "fear for his safety and loss of his guise." 728 F.2d at 898. In contrast, it is Giese's state-law duty to dispatch ambulances in emergencies and it is his possible abuse of this state power in contravention of the Fourteenth Amendment that could make his failure to act (as opposed to that of any other state employee or member of the general public) actionable under § 1983. The evidence in this case is sufficient for the trier of fact to find that Giese abused his state power, but nothing in *Beard* established that the informant had state power and a duty to act, let alone abused it.

Today's decision does not depart from decisions which have held that state actors cannot be held liable under § 1983 for failing to provide the community with an adequate level of protective services. For example, in *Jackson v. Byrne*, 738 F.2d 1443 (7th Cir. 1984), we held that the failure of the City of Chicago to provide for adequate fire protection during a firefighters' strike was not an abuse

of power but rather a nonjusticiable political question. In general the Constitution does not create a duty on the part of the state to provide a minimum level of services, see *supra* at pp. 11-12, but it does require that a state actor under a state duty to dispense allocated services does not recklessly and arbitrarily withhold them from a particular person or class of persons. Similarly, the plaintiffs' complaint in *Jackson v. Byrne* based on the police preventing striking firefighters from gaining access to equipment in a locked fire station really was a complaint about the amount of equipment supplied by the city—a nonjusticiable political allocation decision. The police officers did not abuse their power; they carried out their duty to enforce the laws and policies of the city.[10]

Our decision today is also consistent with *Jackson v. City of Joliet*, 715 F.2d 1200 (7th Cir. 1983), certiorari denied, 465 U.S. 1049, where we held that police officers could not be held liable under § 1983 when they directed traffic around a burning car but, allegedly out of gross

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[10] Some of our other cases are distinguishable on the same basis as *Jackson v. Byrne*. In *Ellsworth v. City of Racine*, 774 F.2d 182 (7th Cir. 1985), certiorari denied, 106 S. Ct. 1265, no state actor breached a Fourteenth Amendment duty not to exercise state power recklessly and arbitrarily: the city did not provide special police protection on the night of the attack to the family of an undercover officer who was the target of threats because the victim had told the assigned police officer it was not necessary for him to stay, *id.* at 186 (Coffey, J., concurring), and no complaint could be based on the general level of police protection provided by the city, *id.* at 185. Similarly, our cases of *Walker v. Rowe*, 791 F.2d 507 (7th Cir. 1986), certiorari denied, 107 S. Ct. 597, and *Bowers v. DeVito*, 686 F.2d 616 (7th Cir. 1982), stand for the principle that the Due Process Clause does not require the state to provide a minimum level of protective services, including safe working conditions for prison guards or protection against murders committed by parolees, even when the parole decision is recklessly made. In neither case did state officials under a duty to act fail to protect the victims because of a deliberate decision not to carry out their responsibilities in reckless disregard of a known substantial risk to the victims. The possible Fourteenth Amendment violation in this case was not present in those cases.

negligence, failed to check the burning car to see if there were any occupants who could be saved. We recognized that some failures to act may amount to an abuse of power:

> It would be a different case if intentional misconduct were alleged; we may assume that if officer Taylor, knowing the car was occupied and wanting the occupants to be burned to death, directed traffic away from the scene in order to prevent any passing driver from saving them, he would be liable under [§] 1983 for having under color of the city ordinance making him a public officer deprived the plaintiffs' decedents of their lives without due process of law.

Id. at 1202. Similarly, a claim under § 1983 would be stated if the police officer knew that occupants were in the car and could be saved while exposing himself to no risk of serious injury, yet decided not to carry out his duty to rescue them for no reason at all. However, nothing in the facts of *Jackson v. City of Joliet* suggested that the police officer and firefighters made deliberate, reckless decisions to deny arbitrarily the benefits of state power to a particular individual. There was no abuse of power actionable under § 1983.

The recent decision of *DeShaney v. Winnebago County Department of Social Services*, 812 F.2d 298 (7th Cir. 1987), is not to the contrary. It held that a complaint failed to state a § 1983 claim when it alleged that a welfare agency caseworker recklessly failed to discover that a child was being abused and to recommend his removal from the household. However, the county agency had earlier determined (after apparently careful consideration) that there was insufficient evidence to establish probable cause that the child would be abused if not kept in the custody of the court. *Id.* at 299-300. Subsequently the court closed the case the agency had brought, over a year before the beating that severely injured the child. *Id.* at 300. Furthermore, although the caseworker was aware of suspicious injuries during the year between the closing of the case and the child's severe beating, she had met

with the parents but did not see the child for the final three months prior to the beating. *Id.* The caseworker did not know the child was being abused and had an important reason for not removing the child absent this knowledge: she and her agency could be liable under state and federal law for improperly terminating parental rights. *Id.* at 303, 304. Given this weighty interest counseling against removal of the child, the caseworker's conduct was not arbitrary and did not amount to an abuse of power.

DeShaney makes clear that not all reckless conduct by state actors rises to the level of a constitutional violation. In this sense, *DeShaney* is similar to *Whitley v. Albers*, 106 S. Ct. 1078, in which the Court held that "deliberate indifference" to prisoners' safety did not violate the Eighth Amendment or the substantive provisions of the Fourteenth Amendment when prison officials acted in the face of a prison riot. 106 S. Ct. at 1084-1085, 1088. The Court held that the deliberate indifference standard of *Estelle v. Gamble*, 429 U.S. 97, "was appropriate in the context presented in that case because the State's responsibility to attend to the medical needs of prisoners does not ordinarily clash with other equally important governmental responsibilities," 106 S. Ct. at 1084, but in the prison-riot context that standard does not adequately reflect the importance of competing obligations and the conditions under which the decision is made, *id.* at 1085. The caseworker in *DeShaney* had to temper her actions in light of the weighty parental interest; her failure to act after a court had closed the case because of insufficient evidence was not an abuse of power, especially where there was no new hard evidence. Thus, in contrast to the present case, in *DeShaney* it is unclear if there was a state law duty to act—the agency had closed the case over a year earlier—and the caseworker's conduct was not arbitrary and offensive to notions of fundamental fairness, given the strong countervailing interest. Dispatcher Giese, on the other hand, received two requests for ambulance services, had no reason for denying those services, knew DeLacy's breathing problem was serious and had continued for at

least six hours, and knew he had always sent ambulances in similar circumstances and had never before instructed someone just to breathe into a paper bag; his actions and failures to act could be an abuse of power.

IV

The present case fits within the "special relationship" rubric that allows recovery under § 1983 for certain denials of state services. The district court here reasoned that no special relationship existed between DeLacy and the City of Racine because the Racine ordinance guaranteed rescue services to all members of the public rather than just a particular citizen such as DeLacy. 627 F. Supp. at 772-773. As we have stated, generally a § 1983 action cannot be brought to challenge the level of services provided by the state, see *supra* at pp. 11-12; however, when a special relationship exists between the state and an individual the state may very well have a constitutionally cognizable duty to provide a minimum level of services. This Court has recognized that "a right and corollary duty to basic protective services may arise out of special relationships created or assumed by a municipality in regard to particular people." *Ellsworth v. City of Racine*, 774 F.2d 182, 185 (7th Cir. 1985), certiorari denied, 105 S. Ct. 1265. The essence of the special relationship concept is that "when the state takes someone into its care or cuts off sources of private aid, the state must afford replacement protection." *Walker v. Rowe*, 791 F.2d 507, 511 (7th Cir. 1986), certiorari denied, 107 S. Ct. 597.

When the state exercises actual control or custody over an individual it may have a constitutional duty to provide services. For example, the state has a duty under the Eighth Amendment not to be deliberately indifferent to prisoners' medical needs. *Estelle v. Gamble*, 429 U.S. 97, 104-105; see also *Watts v. Laurent*, 774 F.2d 168, 172 (7th Cir. 1985), certiorari denied, 106 S. Ct. 1466 (state has duty under Eighth Amendment to protect prisoner from attack when guard "should have realized that there was a 'strong likelihood' of an attack"). In *Youngberg v.*

Romeo, 457 U.S. 307, the Court held that under the Due Process Clause of the Fourteenth Amendment a state has "the unquestioned duty to provide reasonable safety for all residents and personnel within" state mental hospitals and that "the [s]tate is under a duty to provide [the patient] with such training as an appropriate professional would consider reasonable to ensure his safety and to facilitate his ability to function free from bodily restraints." *Id.* at 324; see *id.* at 315-316, 319, 321-322; see also *Spence v. Staras*, 507 F.2d 554, 557 (7th Cir. 1974) (state has duty to protect patient institutionalized in state facility from known risk of assault).

A special relationship between the state and a particular person can also arise where there is no actual control or custody by the state. A municipality that puts a person in a position of danger from private persons and subsequently fails to protect that person can be held liable under § 1983 for the resulting deprivation of life or liberty. *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982). In *White v. Rochford*, 592 F.2d 381 (7th Cir. 1979), we held that non-institutionalized persons could recover under § 1983 for a due process violation when the state actors' conduct cut off their source of private aid. There three children were riding with their uncle on the Chicago Skyway when the uncle was arrested for drag racing. Despite the uncle's plea to take the children along to the police station or to a phone booth, the officers left the children behind in the car. The children had to wander along the highway in the cold to find a telephone and obtain rescue, by which time they had suffered emotional injuries and one child, an asthmatic, required hospitalization. This Court held that the officers could be liable for their grossly negligent or reckless conduct under § 1983, and thus made clear that a state may deprive a person of liberty by denying services although that person is not in the state's actual custody. What is necessary under this line of cases is that the state has exercised control over the person's movements or accepted responsibility for the person's care or cut off private sources of aid or markedly

increased a particular person's risk of danger from others or in some other way assumed a special relationship with a particular person.

In the present case, the trier of fact could find the existence of a special relationship. The findings of fact by the district judge and the evidence presented at trial would support a conclusion that Giese deliberately assumed control over DeLacy's physical welfare. As already discussed, see *supra* at pp. 23-24, the trier of fact could find that Giese, acting recklessly and arbitrarily, dissuaded DeLacy from leaving her apartment and lulled her and Hiles into believing that nothing more need be done than for DeLacy to sit still and breathe into a paper bag. Their reliance on Giese's advice could be found foreseeable (as well as reasonable) because he acted with the apparent authority of a responsible municipal agency and was insistent that all DeLacy need do was to breathe into that paper bag. The fact that DeLacy and Hiles thanked Giese at the end of both conversations is evidence of their acquiescence and trust. Hiles' testimony also supports the view that Giese's unsolicited advice led Hiles and DeLacy to conclude erroneously that the problem was not serious and caused Hiles to leave without seeking other aid:

> I left, yeah, because they told her to take a paper bag and hyperventilate her. I said, "I'm not a doctor, I'm not a doctor, I don't know [.]" I said, "blow in that bag," and [she] kind of had a[—]I didn't know it, she didn't know it[—]she was having a heart attack [while] all the time breathing like that.

Trial Tr. 262. If Giese had failed to answer the phone or, having answered the phone, failed to send a rescue squad, DeLacy could have arranged for another source of aid in the hours she lay dying. A special relationship could be found based on Giese's exercise of constructive control over DeLacy, and his possibly reckless and arbitrary refusal to send an ambulance could violate the limitation on state action imposed by the Due Process Clause.

It is not merely coincidental that the facts of this case might establish a violation under a special relationship theory and an abuse of power theory. The special relationship line of cases is a subset of the abuse of power cases. In special relationship cases, the state actor has exercised his or her state power—even if he or she does so by refusing to act—in an unconstitutional manner, given the totality of the circumstances including the relationship between the state and the plaintiff. When a special relationship can be said to exist, a court is more likely to find that a failure to act rises to the level of a constitutional violation because the state actor is on notice of the need to protect a particular person, as opposed to a member of the general public, and is less likely to have an adequate reason for failing to act. Similarly, the Eleventh Circuit has concluded that the nexus between the state and an individual captured by the phrase "special relationship" is particularly relevant because "the more important the relationship and its attendant duties, the more likely it is that an act or omission on the part of one party has the potential to deprive the other of a constitutional right." *Taylor v. Ledbetter*, No. 85-8354, slip op. at 3060-3061 (11th Cir. June 9, 1987) (*en banc*) (relying in part on special relationship theory to hold that a child placed in a foster home by the state could bring a substantive due process claim based on the state's reckless failure to protect the child from physical abuse).

There is no provision of the Constitution that addresses special relationships as such,[11] but there are provisions that regulate the manner in which state power can be exercised. One provision is the Due Process Clause of the Fourteenth Amendment. When a police officer guns down

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[11] We previously made a similar observation in *DeShaney v. Winnebago County Department of Social Services*, 812 F.2d 298, 303 (7th Cir. 1987). See also *Harpole v. Arkansas Dep't of Human Servs.*, No. 86-2105 (8th Cir. June 3, 1987). But see generally *Taylor v. Ledbetter*, No. 85-8354, slip op. at 3060-3061 (11th Cir. June 9, 1987) (*en banc*) (applying special relationship theory to relationship between the state and a child it placed in a foster home).

a person in circumstances not justifying the use of deadly force the abuse of power is obvious. Even though at first glance the abuse of power may be less apparent, certain failures to act by state actors can also violate the Due Process Clause and thus are redressable under § 1983. In the present case, the trier of fact could find that Giese's possibly reckless and arbitrary failure to act when under a state duty to act amounted to an unconstitutional abuse of power, given the totality of the circumstances of the case, including his exercise of constructive control over DeLacy. The inquiry upon remand of this case is whether such an abuse of power in fact occurred.

V

Plaintiffs must prove a causal connection between DeLacy's death and Giese's unconstitutional conduct to prevail under § 1983. *Martinez v. California*, 444 U.S. 277, 285; *Bass v. Wallenstein*, 769 F.2d 1173, 1182 (7th Cir. 1985); *Lossman v. Pekarske*, 707 F.2d 288, 291 (7th Cir. 1983). Here plaintiffs introduced expert testimony that DeLacy's breathing problem was a "treatable medical condition," the minimum treatment—known for 25 years—for such a problem was applying oxygen, and that DeLacy did not die as a result of a disease which "was terminal irrespective of the type of medical attention she might have received." Trial Tr. 53-59 (testimony of Dr. Baylon); see *id.* at 64-65. Furthermore, testimony was given that a Racine rescue squad had on a previous occasion responded when DeLacy was having breathing difficulties and had placed an oxygen mask over her mouth during the trip to the hospital. *Id.* at 241-242, 243-244 (testimony of Cynthia DeLacy). Also, plaintiffs presented testimony that DeLacy or someone on her behalf had requested ambulance services on several occasions and that she had never refused or attempted to refuse or resist transportation by an ambulance. *Id.* at 333-334 (rebuttal testimony of Joseph Harris, Jr.).

Absent the presentation of contrary evidence by Giese, the evidence presented by plaintiffs would be sufficient

to establish causation. For example, in *Bass v. Wallenstein*, 769 F.2d 1173 (7th Cir. 1985), this Court held that evidence that a prisoner would have had "a 10-30% chance of survival" if a doctor had provided advanced cardiac life support was sufficient to support a jury verdict against a doctor who displayed deliberate indifference to a prisoner's medical condition by ignoring three calls informing him of the medical emergency while the prisoner lay dying and by not starting life support until the prisoner's condition was irreversible. *Id.* at 1178, 1182-1184. Similarly, the plaintiffs here presented evidence that DeLacy would have had an appreciable chance of survival because her condition was treatable and, in fact, had been successfully treated in the past with the aid of a Racine rescue squad, and thus Giese's possibly unconstitutional abuse of power may have caused DeLacy's suffering and death. Causation may even be stronger here than in *Bass v. Wallenstein* because the trier of fact could find that Giese's conduct, including the facile medical advice, caused DeLacy to remain in her apartment rather than go to the nearby hospital and caused Hiles to leave and not seek additional sources of aid for her. See *supra* at p. 32; see also *DeShaney v. Winnebago County Dep't of Social Servs.*, 812 F.2d 298, 303 (7th Cir. 1987).

In *DeShaney* we approached the causation issue by asking what would have happened if the county agency had never existed. 812 F.2d at 302. We concluded that the caseworker's allegedly reckless failure to discover that a child was being abused and to remove him from his family did not cause the child's severe injuries, rather his father did. *Id.* at 302-303. As we have explained, there was no abuse of power in *DeShaney* because the caseworker may not have been under a duty to act and her failure to act was not arbitrary but rather was motivated by a sound reason, namely, the important interest in not unnecessarily interfering with the family unit. See *supra* at pp. 28-29. The absence of a constitutional violation in *DeShaney* distinguishes it from our prior decision of *Bass v. Wallenstein*, as well as the present case. When a plaintiff proves that an abuse of state power has occurred, it is improper

to assume the non-existence of the unconstitutional conduct that naturally and foreseeably led to the victim's injuries. Here Giese's failure to act may have caused DeLacy's death because the trier of fact could find on remand that but for Giese's unconstitutional abuse of power, an ambulance would have been sent and DeLacy would have had an appreciable chance of surviving. See *Bass*, 769 F.2d at 1182-1184.

VI

The evidence presented at the trial of this case was sufficient to support a verdict that Giese's conduct amounted to an abuse of power violative of the Due Process Clause. Therefore, the district court's granting of defendant's directed verdict motion at the end of trial in favor of defendant Giese must be reversed.* The directed verdicts in favor of defendants Chiapete and the City of Racine were properly granted. On remand, the district judge, who is sitting as the trier of fact in this case, should determine consistent with this opinion whether Giese's conduct was an unconstitutional abuse of power. The district judge should rely on the evidence presented at the prior trial, his previous findings of fact, and any new evidence which he may decide is necessary to his decision and directs the parties to present. Circuit Rule 36 shall not apply on remand.

Reversed in part and remanded for further proceedings consistent herewith.

A true Copy:

Teste: _____

Clerk of the United States Court of Appeals for the Seventh Circuit

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*** The Seventh Circuit amended this decision on August 10, 1987. The amendment provides, "Therefore, the district court's judgment in favor of defendant Giese must be reversed. The judgments in favor of defendants Chiapete and the City of Racine are affirmed."**

Betty J. ARCHIE, as Special Administator of the Estate of Rena M. DeLacy, Deceased, Cynthia F. DeLacy, Marlon J. DeLacy, Darwin D. DeLacy, Veronica M. Brumsey, and Randall R. DeLacy, a minor, by Adrian P. Schoone, his Guardian ad Litem, Plaintiffs,

v.

CITY OF RACINE, Ronald W. Chiapete, George W. Giese, Defendants.

Civ. A. No. 84-C-926.

United States District Court,
E.D. Wisconsin.

Feb. 11, 1986.

DECISION AND ORDER

TERENCE T. EVANS, District Judge.

This case was tried to the court on September 24, 25, and 26, 1985. At the close of plaintiffs' case, defendants Racine County, John Esayian, and Herbert E. Johnson were dismissed from the suit. The following constitute my findings of fact and conclusions of law regarding the claims against the remaining defendants, the City of Racine, Ronald W. Chiapete and George W. Giese.

Three people play central roles in the tragedy that unfolded in Racine, Wisconsin, on May 27 and 28, 1984. First is Rena DeLacy, a black woman who died in her home in the early morning hours of May 28, 1984. At the time of her death she was only 43 years old, but her health was not good. The autopsy, performed by Dr. Victor Baylon, revealed the following conditions:

1. Moderate coronary arteriosclerosis.
2. Bilateral arterial nephrosclerosis.

3. Bilateral vesicular pulmonary emphysema.
4. Bilateral acute bronchopneumonia.
5. Bilateral pulmonary edema.
6. Severe fatty liver.
7. Severe fibrosis of pancreas.
8. Benign ovarian cyst.
9. Esophageal ulcer.

Dr. Baylon concluded that the cause of Ms. DeLacy's death was "respiratory failure due to bilateral vesicular pulmonary emphysema with superimposed bronchopneumonia."

The second major actor is Les Hiles, a man well known to some in the Racine community, and almost universally referred to as a "character." Hiles was with DeLacy the day before she died. He initiated two calls to the Racine Fire Department seeking rescue services.

Third is Giese, a dispatcher with the Racine Fire Department who took both of Hiles' calls, told DeLacy to breathe into a paper bag, and refused to send the rescue squad to her home.

A supporting minor part is played by Chiapete, the Racine Fire Chief, who was in charge of rescue services for the city.

The events of May 27 and 28, 1984, began at 7:19 a.m. when Hiles called for the rescue squad. The conversation was recorded, and is as follows:

GIESE: Fire Department, Giese.

HILES: Hi. Say, this is Les Hiles, and we have a lady that's really, aahhhhhh, I don't know, I'm not a

doctor, hyperventilating. She can't hardly breathe, and I said, well, let's go down to the emergency ward. Say's, "I can't walk," Ahhhhhhh, so I says, well, I thought I could call rescue squad together, okay. 818 College Avenue

GIESE: What's the address?

HILES: 818 College Avenue. I'll meet you out in front.

GIESE: What's the problem with her?

HILES: She just don't–just breathing like, you know, she just can't get her breath or nothing.

GIESE: How old is she?

HILES: Ah, excuse me. Rena, how old are you? Forty-three.

GIESE: Let me talk to her, please.

HILES: Okay. Come here, come here. Wants to talk to you. She ain't big enough. Four hours don't people– (Makes sound of a person breathing very hard). See, I'm, I'm Les Hiles you know and I could be the best act in the world but–

GIESE: Let me talk to her. Put her on the phone.

HILES: She's coming. She ever gets here. I know what's wrong with her.

RENA: Hello.

GIESE: Hi, what's, what's, what's the problem?

RENA: Hyperthermia.

GIESE: Hyper what?

RENA: Thermia. Having a hard time breathing.

GIESE: Have you ever had this trouble before?

RENA: Once, once.

GIESE: Why don't you slow down just a little bit and relax?

RENA: And stay in my own apartment?

GIESE: Just relax and don't breath like you're breathing.

RENA: Okay.

GIESE: Do me a favor.

RENA: Yes.

GIESE: Get, get a little paper bag.

RENA: A little what?

GIESE: A paper bag.

RENA: Paper bag.

GIESE: And put it over your mouth and breathe into that. That will slow your breathing down.

RENA: Okay, thank you.

GIESE: Okay, bye.

RENA: Bye.

It is clear from listening to the tape that Hiles was anxious to get help for DeLacy. It is also clear when DeLacy spoke that she was in distress. In his testimony Giese acknowledged that he recognized the difficulty she was having. The sounds of her heavy labored breathing are heard on the tape.

Almost eight hours later, at 3:03 p.m. on May 27, 1984, Hiles again called the Fire Department. The conversation was as follows:

GIESE: Fire Department, Giese.

HILES: Hi, this is Les Hiles, Giese.

GIESE: Yeah.

HILES: Listen, this, this lady, ah, my little black girl friend, I, I called before and tried the paper bag. She's still hyper–how do you say that word, hyperventilating?

GIESE: M'hm.

HILES: But she sat here for six hours. I mean, did, and I asked, "Did you ever do this before? She said, (slurred words) only once in a while. But it scares me, you know, me.

GIESE: Well, if she's hyperventilating, just, just have her do what I told you to do. She's going to have to breathe into that bag.

HILES: Yeah, but.

GIESE: Over her nose and her mouth and then slow her breathing down.

HILES: Listen to me now. Is there anything do with the heart?

GIESE: No.

HILES: It isn't going to beat the heart out?

GIESE: No.

HILES: Cause I know . . . . like my chest when . . . . I'm talking. You know who I am. Les Hiles.

GIESE: M'hm.

HILES: The swimmer? Okay, what I thought, my God, man, maybe it'll wear her heart out.

GIESE: No.

HILES: No? Okay. Say, what's your first name?

GIESE: George.

HILES: Oh, thanks a lot.

GIESE: Okay.

HILES: Thank you very much.

GIESE: Yeah.

HILES: Bye.

Early on May 28, 1984, Hiles found DeLacy dead, sitting in a chair in her apartment. He called the police and Sgt. M.S. Ackley was one of the officers who arrived at the scene to investigate. Ackley confirmed that DeLacy was dead and called the Coroner's Office.

Hiles told Ackley of his calls for the rescue squad. Before he left the scene, Sgt. Ackley called the Fire Department to check to see if the rescue squad had been called. His report as to what he learned is as follows:

> It should lastly be noted that while the writer was at the home awaiting the arrival of the Assistant Deputy Coroner, I did make contact with the Racine Fire Department. I spoke with the third shift phone operator and advised him of the allegations made by MR. HILES. The third shift dispatcher said that he had not talked with a day shift operator, but he would gladly check the log for rescue runs at that address. The day shift operator further stated they had no logs listing of run with a rescue at that address. The night shift operator stated he would recontact the day shift operator in the morning, and see if any such call did indeed come in. The midnight phone operator from the Fire Department did state that he very seriously doubt it that they would not respond to the call, as they will respond to almost all calls for service irregardless of the frivolity of the alleged problem.

Sgt. Ackley's testimony indicates that he was immediately concerned that the situation had been handled inappropriately.

The policy of the Racine Fire Department as to rescue calls, in Municipal Ordinance 5.11.020, is that the Fire Department answers all calls as delineated by the Chief or the Assistant Chief. Fire Chief Chiapete states that the Department answers "all emergency calls." No written statement exists as to what constitutes an emergency.

Chiapete testified at trial that Giese should have dispatched the rescue squad to DeLacy. Chiapete would have done so. But he also stated that he could understand how Giese came to a different conclusion.

Jeffrey G. Peterson, Assistant Chief of the Racine Fire Department in charge of training in May, 1984, stated that the verbal policy of the Fire Department was to send rescue units to all emergency calls. He also stated, in response to hypothetical questions, that a rescue squad should have been sent in a situation such as the DeLacy situation. According to Peterson, the only information it is necessary to give to the dispatcher is the address and the type of service required. The dispatcher likes to have the name of the person as well, in case the address given is incorrect.

An official investigation into Giese's conduct resulted in the following Press Release from Chiapete, which is quoted here in part:

> Addressing the specific incident of May 27, 1984 my conversation with Pvt. Giese indicates to me that he came to the conclusion, based on the conversation with Ms. DeLacy and Mr. Hiles, that an emergency situation did not exist. My review of the tapes of those conversations indicates that his conclusion is not entirely unwarranted. It is my view that Pvt. Giese made a judgment call based on his present analysis of the conversations with the calling parties.

> I believe that his decision was honestly made and without any intent on his part to refuse service or harm any person.

In view of my analysis of the situation it is my present intention not to impose any disciplinary action on Pvt. Giese.

Viewing the entire situation from the perspective of hindsight, however, I believe that it may have been better judgment if Pvt. Giese had dispatched the rescue unit. Hindsight is, of course, always perfect, and it is difficult to say what any individual would or would not do at the time an incident arises.

At present my department does not have a written policy with respect to the discretion of dispatchers, and that matter is presently under review by Assistant Chief Jeffrey Peterson who recently assumed the duties of the department training officer.

The department naturally regrets the unfortunate death of Rena DeLacy but cannot assume responsibility for it. At worst, the department can be faulted for an error of judgment which we believe is understandable in view of the circumstances, and must be judged from the perspective of the thousands of calls received by our department each year, and the great number of persons who are helped by our rescue service. We have never refused and never will refuse to send our rescue units in known emergency situations.

Why did Giese decide not to send a rescue squad to the DeLacy home? Was it because Rena DeLacy was black? Was it because he didn't believe Les Hiles? Was it because he didn't think a true emergency existed? The

first question, from a constitutional standpoint, is the most important. The answer to it is "no". Giese specifically denied that the refusal to send aid was due to DeLacy's being a black woman. A review of the rescue squad calls shows that in fact no pattern of discrimination against blacks on this point in Racine can be established. On this question, I believe that Giese's failure to act was not race motivated.

Race aside, Giese has no consistent explanation for his action or, more appropriately, his failure to act. He testified that he had never before decided not to send an emergency vehicle when one was requested. He acknowledged that Hiles was coherent and DeLacy's voice showed that she was in distress. Giese testified, however, that Hiles was known to him and that he believed that Hiles was a "jerk". At a deposition Giese had testified that he did not refuse to send the ambulance on the basis that it was Hiles who had requested it. Later, however, he changed an answer on the deposition. The manner in which the change was made is as follows:

> Q. Would you tell Mr. Giles the Court Reporter tonight of the change that you wish to make and the reason for the change?
>
> A. The change is on page 18, the question is line 2. My answer to that question was "True". I believe that it should have said "False". On the day that Mr. Hiles called, I believe that I didn't send the rescue squad is because he was the caller. And I believe that just from reputation I knew he is the type of a nuisance that it was more than likely a needless type call, and I believe that's why the rescue squad wasn't sent.

At trial, Giese said he didn't know, that he couldn't explain why he hadn't sent the rescue squad. He also testified that he didn't know why he told DeLacy during *both* calls to breathe into a paper bag.[1]

I find absurd Giese's apparent belief that his refusal to send the rescue squad can somehow be justified because Hiles was the one who asked for it. It is undisputed that Hiles has a reputation in Racine: he was in the County Jail at the time of the trial; he drinks; he is described as an iconoclast, a character; he described himself on one of the tapes as the swimmer, which has apparently significance beyond the ordinary. Nevertheless, on the tapes he is lucid; it is clear what he wants; his voice reflects the urgency of the situation. At trial he was articulate and perfectly capable, in my view, of judging

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[1] The advice regarding the paper bag is not without some support. See pages 66 and 67 of Exhibit 126, the Johnson & Johnson *First Aid Book*, where the following appears on the subject of controlling hyperventilation:

BREATHING PROBLEMS

Shortness of breath
Controlling hyperventilation

A hyperventilating person usually responds to reassurance and to one of the following approaches:

A. Encourage the person to breathe slower and slower and to hold his breath for a few seconds before exhaling.

OR

B. Have the person breathe the same air repeatedly for 3 or 4 minutes by breathing into a paper bag held over his mouth and nose or into a bowl.

when an emergency would exist, and also perfectly capable of describing it. In addition, it should be noted that, with no difficulty, the Racine Police Department responded to his call regarding DeLacy's death.

That Giese's responses to Hiles' calls were inappropriate cannot seriously be disputed. Whether Giese's conduct was stupid, or more charitably just poor judgment, however, is not the issue. The issue is whether a constitutional claim has been presented. Has the defendant's failure to provide DeLacy with rescue services violated a constitutional duty owed to her?

A preliminary hurdle must be overcome in establishing liability against Chiapete and the City: they can be held liable only if plaintiffs can establish that the alleged violation arose from official custom or policy. *Monell v. New York City Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). Plaintiffs contend that the policy of the Fire Department to answer all emergency calls was too vague to provide meaningful guidance to a dispatcher and allowed the DeLacy situation to occur.

Monell has spawned a number of cases which attempt to establish that allegedly unconstitutional conduct occurred, for instance, because of a city's inaction, inadequate policy, lack of supervision, or inadequate training of the individual who harmed a plaintiff. In such a case, the Supreme Court has recently decided in *City of Oklahoma City v. Tuttle*, ___ U.S. ___, 105 S. Ct. 2427, 85 L.Ed.2d 791, 53 U.S.L.W. 4639 (1985), that a single incident cannot establish fault on the part of a policymaker. The failure to train employees or to take adequate action when they act

improperly is distinguished from the situation in *Monell*. In *Monell*, the city had an affirmative policy which in itself violated the rights of the plaintiffs; one incident in which the policy was implemented was sufficient to establish a violation. However, where, as here, a plaintiff is contending that an inadequate policy *allowed* a plaintiff's rights to be violated, a single incident will not support a claim against the policymakers. Accordingly, Chiapete, who had no personal involvement in the incident, and the City of Racine must both be dismissed for that reason alone.

As to Giese, however, the issue remains whether plaintiffs have proved a constitutional violation. In claiming that they have not, defendants rely on a number of cases, including *Ellsworth v. Racine*, 774 F.2d 182 (7th Cir.1985); *Jackson v. Joliet*, 715 F.2d 1200 (7th Cir.1983), *cert. denied*, 465 U.S. 1049, 104 S.Ct. 1325, 79 L.Ed.2d 720; and *Jackson v. Byrne*, 738 F.2d 1443 (7th Cir.1984). Plaintiffs rely on other cases, including *White v. Rochford*, 592 F.2d 381 (7th Cir.1979); *Bass v. Wallenstein*, 769 F.2d 1173 (7th Cir.1985); and *Duncan v. Duckworth*, 644 F.2d 653 (7th Cir.1981); and plaintiffs argue that the City of Racine, by deciding to provide emergency services to its citizens, created with them a "special relationship" constitutionally requiring Racine to provide emergency services.

Even before *Oklahoma City v. Tuttle, supra*, it was indisputable that it is much more difficult to establish a claim for failure to provide services than for affirmative misdeeds. A person harmed by an official's failure to act has a much greater burden than a person harmed by, say,

a policeman beating him. The reason is that the Constitution is "a charter of negative rather than positive liberties." *Jackson v. Joliet, supra,* at 1203. The Constitution protects a citizen from encroachment against his person but does not require the government to shield him from harm–so much so that in *Jackson v. Joliet* the court stated:

> It is enough to note that, as currently understood, the concept of liberty in the fourteenth amendment does not include a right to basic services, whether competently provided or otherwise.

Notwithstanding, in certain cases, courts have found that the Constitution creates an affirmative duty to provide elementary protective services to specified individuals. However, in every one of the cases, the individuals entitled to services were persons with whom the state had a custodial or other "special relationship." Thus arises plaintiffs' argument here that Racine has created a special relationship with its citizens to provide emergency services.

Often the cases requiring the state to provide services involve either inmates or persons in mental institutions who are helpless to take independent measures to obtain services for themselves. *Bass v. Wallenstein, supra,* fits this mold. Bass was incarcerated at Stateville Correctional Center. At about 11:30 one night he asked for medical assistance. He asked again at 2:00 a.m., and again at 6:00 a.m. Finally, about 8:30 a.m., someone took action to help him. However, there was more bungling before Bass finally arrived at the prison hospital at 8:45 a.m. He died of cardiorespiratory arrest. A finding of liability against various prison officials was sustained.

Similarly, the state also has a duty to protect inmates of the state mental hospitals from known risks of assault. *Spence v. Staras,* 507 F.2d 554 (7th Cir.1974).

In certain unique situations, officials are under a duty to protect citizens who are not institutionalized. Police officers are required to render aid to a person being beaten by fellow officers. *Byrd v. Brishke,* 466 F.2d 6 (7th Cir.1972). And in *White v. Rochford, supra,* police were found liable for leaving unattended small children in a car on the Chicago Skyway in cold weather. The court determined that the actions of the police violated the due process restraint on undue incursions on personal security as well as its restraint of state activities which "shock the conscience." The case involved "gross negligence" and "reckless disregard" for the safety of the children who, the court said, the police could not avoid knowing would be subjected to dangers from both cold weather and traffic. *White* has become a case which the Court of Appeals for the Seventh Circuit consistently refers to as one in which a special relationship exists. *See Jackson v. Byrne, supra; Ellsworth v. Racine, supra.*

However, it appears that as far as persons not in an institution are concerned, a special relationship is not easily established. *Ellsworth, supra,* was brought by a Racine undercover narcotics agent and his wife. Because of the agent's activities, his family became the target of threats "from underworld figures." Police protection was provided for Mrs. Ellsworth while her husband was working. One day she released her guards from duty and that same day she was severely beaten in the back yard of her home. The court reiterated that the fourteenth

amendment does not include a right to basic public services:

> There is nothing in the Constitution which requires governmental units to act when members of the general public are in danger.

At p. 185. However, the plaintiffs tried to establish that Mrs. Ellsworth was more than a member of the general public; rather, she was said to be a person with a special relationship with the city who enjoyed a constitutional right to protection. Recognizing that the contours of a "special relationship" are hazy, the court failed to find one between Mrs. Ellsworth and the defendants.

Similarly, Joliet police had no duty to save accident victims from their burning car. *Jackson v. Joliet*. Neither did Chicago city officials have a duty to save children from a burning building. *Jackson v. Byrne*. In the latter case in fact, the court rejected a last ditch effort by the plaintiffs to argue that although a city was not constitutionally required to provide services, once it established itself as the provider of services it owed a duty to the plaintiffs to do so.

Rena DeLacy, personally, has no greater claim to a special relationship with Racine than do all other citizens of the city. In fact, plaintiffs do not attempt to say that DeLacy, as opposed to other citizens, has a special relationship. In that sense the claim is unlike the *Ellsworth* claim. The argument here is that because the city has decided that it will provide emergency services to its citizens, it has a special relationship with all citizens of Racine, including Rena DeLacy. This argument has been flatly rejected. *See Jackson v. Byrne*.

Of course if the reason service is not provided is race, an equal protection violation is established. DeLacy was black. However, as I previously noted, nothing in this case convinces me that Giese failed to act because of DeLacy's race. He sent rescue squads regularly into the black community. The testimony shows that a high percentage of rescue calls in Racine are to areas with high concentrations of citizens. That fact neutralizes any conceivable inference which might be drawn that race was a reason for Giese's failure to send the squad.

The elements of a constitutional violation are a matter of well established legal principles. The Constitution does not protect citizens against all wrongs which they suffer at the hands of state and city officials. Rescue services should unquestionably have been provided to DeLacy. The fact that they were not, however, is not a constitutional violation.

Accordingly, the action is DISMISSED.

No. 88-576

Supreme Court, U.S.
FILED
OCT 27 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term

BETTY J. ARCHIE, et al.,

Petitioners

vs.

CITY OF RACINE, RONALD W. CHIAPETE, and GEORGE GIESE,

Respondents

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

CITY OF RACINE
CITY ATTORNEY'S OFFICE
Joseph E. Boyle
Attorney for Respondents
730 Washington Avenue
Racine, Wisconsin 53403
(414) 636-9115

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SUMMARY OF ARGUMENT

1. There is no conflict among the Circuit Courts of Appeal with respect to the criteria necessary in establishing the existence of a "special relationship". All circuits concur that some type of actual control is necessary.

2. The majority en banc decision from the Seventh Circuit concedes 1983 liability in cases of intentional harm or reckless conduct where a "special relationship" exists.

3. The majority en banc decision of the Seventh Circuit recognized decisions of the Supreme Court and included those decisions in the reasoning behind its decision.

4. This case does not lend itself to an "equal protection" analysis since there is no legislative act involved. Racial motivation has been eliminated by all judges who reviewed this case.

RESPONDENTS' STATEMENT OF THE CASE

A review of Petitioners' statement of the case shows that they have skewed the facts so as to show them in the light most favorable to their position.

The correct facts are generally stated in better detail in the decisions which form the appendix to Petitioners' Petition. Respondents, however, wish to point out the following salient points which highlight omissions from Petitioners' statement of the case which Respondents feel are important to an understanding of the case:

1. Les Hiles (who is White, contrary to Judge Posner's Statement, P.Ap. 25) telephoned the Racine Fire Department from Rena DeLacy's home in the early morning hours of May 27, 1984, and it is also he who first offered the diagnosis "hyperventilating" to the dispatcher. It was this proffered diagnosis that led to the "paper bag" remedy. (P. Ap. 73-74.)

2. The calls from Mr. Hiles were,

at best, unusual and somewhat confusing. In fact, Mr. Hiles states in the first call, "I am Les Hiles you know and I could be the best act in the world. . ." Mr. Hiles was at the time well known in the Racine community as a ne'er-do-well and a drunk. This was known to the dispatcher. (P. Ap. 74 and 81.)

3. Ms. DeLacy (who is Black) spoke to the dispatcher at his request and reaffirmed her problem as hyperventilation although she described it as hyperthermia; she indicated she had the problem before; and most importantly did not ask personally for rescue squad service. (P. Ap. 74-75.) Les Hiles' testimony at trial indicated that she didn't want this service. (P. Ap. 7, footnote.)

4. Petitioners make the blatently incorrect statement that the dispatcher directed her to remain at her apartment. This is not supported in the record. Ms. DeLacy asked, "And stay in my own

apartment?" This was never suggested by the dispatcher nor did he comment on her question. (P. Ap. 74-75.)

5. The "paper bag" remedy is an accepted first aid practice in cases of hyperventilation. (P. Ap. 81.)

The Respondents believe that the above itemized facts are important in judging the "totality of circumstances" which Petitioners advance as a necessary consideration in this case.

ARGUMENT

The Respondents' request of the Supreme Court that the Petition for Writ of Certiorari be denied for the following reasons:

I.

THE CONFLICT AMONG THE CIRCUITS AS ALLEGED BY PETITIONER IS NON-EXISTENT.

In response to Section I of Petitioners' Petition alleging that "there is a direct and irreconcilable split among the United States Court of Appeals. . . ." On this question it is observed that the "split" asserted by Petitioners is considerably overstated. Judge Easterbrook, the author of the en banc decision out of the Seventh Circuit Court of Appeals, reviewed this same question (P. Ap. 18, footnote) and concluded that decisions of the Seventh Circuit had been followed by decisions in the District of Columbia Circuit, the First Circuit, the Second Circuit, the Eighth Circuit, the Ninth

Circuit, and the Eleventh Circuit. The only circuit reaching a dissimilar conclusion in a decision has been the Third Circuit in a 1985 case which interestingly enough is the oldest decision cited by Judge Easterbrook in that footnote. Estate of Bailey v.York, 768 F. 2d 503, CA3 (1985).

A review of Bailey, supra, reveals that it was a split panel decision with the dissenting judge disagreeing on the very point which relates to this discussion; to wit: the concept of "special relationship." Also that case did involve state custody of a child who subsequently suffered fatal injuries. The case was decided on unique facts with the majority saying (p. 511):

> We find it sufficient to hold that in the special circumstances pleaded here, this case falls on the other side of the line suggested in Martinez. (Emphasis added.)

Respondents' research indicates that no circuit has found a "special relationship" in the absence of actual control

of an injured party by a state actor; i.e., putting a person in danger. Actual control need not involve legal custody. In this case the dispatcher, George Giese, never exercised actual control over Rena DeLacy.

From the standpoint of the criteria for the establishment of a "special relationship", therefore, there is no conflict among the circuits.

II.

THE SEVENTH CIRCUIT MAJORITY DECISION DOES NOT PRECLUDE LIABILITY IN RESCUE OR PROTECTION SITUATIONS.

On page 14 of their Petition, Petitioners make the erroneous statement that:

> In this case, the majority opinion effectively holds and concludes, irrespective of how the power is abused, § 1983 liability will not attach in any rescue or protection context. (Emphasis added.)

This is simply not true. The majority opinion makes it clear that such liability will attach in cases involving intentional harm,

reckless conduct which is tantamount to intent, and where a special relationship is created between the state actor and the injured party. This latter situation is summed up by the majority when it states:

> When the state puts a person in danger, the Due Process Clause requires the state to protect him to the extent of ameliorating the incremental risk. When a state cuts off process of private aid, it must provide replacement protection. (P. Ap. 22.)

The majority decision properly excluded negligence, whether ordinary or gross, as a basis for liability under § 1983. (P. Ap. 15.) These conclusions of the majority are in all respects consistent with generally accepted principles governing claims brought under § 1983.

III.

THE DECISION OF THE EN BANC MAJORITY IN THE SEVENTH CIRCUIT DOES NOT CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

Apparently one of the grounds advanced by Petitioners in urging the Court to grant a writ in this matter is that the

en banc decision from the Seventh Circuit conflicts with an applicable decision of this court. They specifically mention Whitley v. Albers, 475 U.S. 312 (1986).

Respondents' review of this case indicates that Petitioners' reliance on it is misplaced. First of all, that case centered about a violation of the Eighth Amendment to the Constitution which is not involved in the present petition. Secondly, the majority in the en banc decision from the Seventh Circuit was cognizant of Whitley and cited it in making the analysis with respect to reckless conduct being equivalent to intentional conduct. (En banc decision, Slip Op., page 13, omitted from Petitioners' Appendix, attached hereto as Respondents' Appendix 1.)

Again Petitioners have misstated the facts of this case by indicating that Respondent Giese acquired custody of Ms. DeLacy and rendered unsolicited "facile" medical advice and directing her to remain

in her home. They also state that he affirmatively discouraged her from seeking private aid. None of this is true as indicated previously by Respondents in their corrections to Petitioners' statement of the case.

Petitioners have no grounds, therefore, to assert that the majority in the Seventh Circuit rendered a decision which is in conflict with an applicable decision of this court.

IV.

AN "EQUAL PROTECTION" REVIEW IS NOT NECESSARY IN THIS CASE.

With respect to race being a motivating factor for the dispatcher's failure to send the rescue squad, none of the 13 judges who have so far reviewed this fact situation have concluded that race played a part in the dispatcher's decision. While Judge Posner, in his concurring opinion in the Seventh Circuit, speculated that race may have been a factor, he did so from an erroneous conclusion that Les Hiles was Black.

In addition, the dispatcher testified that race was not involved in his failing to send the rescue vehicle and it was clear at trial that the Racine Fire Department has sent such vehicles to the assistance of thousands of minority persons. Also, the dispatcher did state reasons for his failure to send a rescue squad when he stated:

> On the day that Mr. Hiles called, I believe that I didn't send the rescue squad is because he was the caller. And I believe that just from reputation I knew he is the type of a nuisance that it was more than likely a needless type call, and I believe that's why the rescue squad wasn't sent. (P. App. 80.)

While the trial judge found this reason to be absurd and the result of stupidity or poor judgment, nevertheless a reason was stated.

It is interesting to note that a single Supreme Court case relied on in Petitioner's equal protection argument is

Logan v. Zimmerman Brush Co., 455 U.S. 422, 71 L. Ed. 2d 265 (1982). Respondent's reading of this case indicates that it was decided on the basis of the Due Process Clause of the Fourteenth Amendment and not the Equal Protection Clause. In a separate opinion four justices discussed the Equal Protection Clause and make the following statement:

> For over a century, the Court has engaged in a continuing and occasionally almost metaphysical effort to identify the precise nature of the Equal Protection Clause's guarantees. At the minimum level, however, the Court 'consistently has required that legislation classify the persons it affects in a manner rationally related to legitimate governmental objectives.'"

It seems, therefore, that equal protection privileges are directed toward legislative acts rather than the acts of individual state agents. (See Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 60 L. Ed. 2d 870, (1979).)

There is no legislative act involved in the present case and Respondents take the position that further analysis of equal protection aspects is unwarranted.

CONCLUSION

Petitioner has not stated grounds under Rule 17 of the Rules of the Supreme Court to warrant the granting of a Writ of Certiorari in this case, nor have they stated any special and important reasons which would justify such a Writ.

The alternative request by Petitioners to remand the matter to the Seventh Circuit pending the decision of DeShaney v. Winnebago County (Supreme Court Case No. 87-154, 1987) is also not warranted. It is Respondents' position that a decision in DeShaney favorable to the Petitioners in that case would not necessarily be instructive in the present case because there are great dissimilarities in the facts centering mainly about the custody/control question.

For the reasons stated in this brief, Respondents respectfully urge the Court that it deny Petitioners' Petition for a Writ of Certiorari in this matter.

Dated: October 27, 1988

Respectfully submitted,

CITY OF RACINE
CITY ATTORNEY'S OFFICE
Joseph E. Boyle
730 Washington Avenue
Racine, Wisconsin 53403
(414) 636-9115
Attorney for Respondents

A P P E N D I X

holding in *Davidson* and *Daniels* that the Due Process Clause does not forbid negligent deprivations, the Court recognized that the Constitution forbids deliberate, unauthorized deprivations. Giese did not slay DeLacy, but his inaction coupled with bad advice was a step on the path to her death—enough so that a court might award damages in tort. The advice to breathe into a paper bag might have led DeLacy to think that she did not need further aid (though there was no testimony to that effect). Combining the rule against the deliberate deprivation of life with the tort law's view of causation, the plaintiffs could have a case for liability. With one more step: a weakening of the intent rule. Giese did not want DeLacy dead, so his conduct was not intentional the way that word is used in constitutional law. See *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979).

The Court sometimes treats the reckless infliction of injury as equivalent to intentional infliction. See *Whitley v. Albers*, 475 U.S. 312, 319-21 (1986) (Cruel and Unusual Punishments clause); cf. *Daniels*, 474 U.S. at 334 n.3 (reserving the question whether either recklessness or gross negligence would be enough to make out a due process claim). The equation of reckless with deliberate conduct is familiar, on the ground that reckless disregard of a great risk is a form of knowledge or intent. E.g., *Sunstrand Corp. v. Sun Chemical Corp.*, 553 F.2d 1033, 1039-40 (7th Cir. 1977) (securities laws); Model Penal Code §210.2(1)(b) (1980) (treating reckless homicide as murder). We assume that the Supreme Court would hold that recklessly causing the death of another deprives that person of life without due process of law.

An act is reckless in the pertinent sense when it reflects complete indifference to risk—when the actor does not care whether the other person lives or dies, despite knowing that there is a significant risk of death. See Model Penal Code 21 (defining recklessness as "conscious disregard of [a] risk . . . [that] manifests extreme indifference to the value of human life." See also *Whitley*, 475 U.S. at 321, adopting this court's definition in *Duckworth v.*